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In the United States District Court
Middle District of Tennessee
Nashville Division

Archie Nathaniel Biggers,
Petitioner,

vs.

Lake F. Russell, Warden,
Tennessee State Penitentiary,
Respondent.

} Civil Action No. 5120

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-586

WILLIAM S. NEIL, WARDEN,
Petitioner,

v.

ARCHIE NATHANIEL BIGGERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 27, 1971
CERTIORARI GRANTED FEBRUARY 28, 1971

Introductory Statement

May it Please the Court:

By Order of February 28, 1971, this Court granted the motion of Petitioner to use the record in No. 237, October Term, 1967. That record may be found in Volume 51, Transcripts of Records and File Copies of Briefs, Nos. 232-237, Supreme Court of the United States, October Term, 1967, in the library of the United States Supreme Court.

The transcript of the record used in 1967 together with the file copies of the briefs found in said Volume 51 is complete with the exception of the transcript of oral argument when this case was heard January 15, 1968. That oral argument has been transcribed and filed in this cause as Appendix J (found in "Motion for Leave to Supplement Appendix to Petition for Writ of Certiorari") (in blue cover.)

Also a part of the record in No. 237, October Term, 1967, was the order of this Court granting certiorari (Appendix H at page A67 in the petition for certiorari), per curiam opinion affirming the judgment below (Appendix G in the petition for certiorari, at A61) and the order of this Court denying a petition to rehear (Appendix F to the petition for certiorari, at A60).

This Appendix contains all the relevant items, opinions and judgments except as above stated and except the opinion of the United States Court of Appeals for the Sixth Circuit which is found in the appendix to the petition for writ of certiorari as Appendix A at pages A1-A38. *

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* The Sixth Circuit Opinion (Appendix A) and the transcript of oral argument in 1968 (Appendix J) (in blue cover), have not been reprinted in this single appendix in accordance with the Clerk's memorandum to counsel which advises that these need not be reprinted where they were previously included in a printed petition for certiorari.

In The

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ARCHIE NATHANIEL BIGGERS,
Petitioner,

v.

LAKE F. RUSSELL, Warden
Tennessee State Penitentiary
Nashville, Tennessee,
Respondent.

Civil Action No. 5120

RELEVANT DOCKET ENTRIES

July 1, 1968 Order entered by Judge William E. Miller directing Clerk to file petition for writ of habeas corpus in forma pauperis; Copy to be served on the Attorney General, State of Tennessee; Respondent to file his answer within the time allowed by law; respondent will submit affidavits in support of his position, and petitioner shall have 15 days thereafter to file his own affidavit in support of the allegations in his petition and to propound written interrogatories to the respondent's affiants. After the affidavits and interrogatories have been filed, the Court will determine what further action is required.

August 6, 1968 Motion to Dismiss filed by

defendant, with Exhibits A & B. Certificate of service attached.

May 12, 1969 Order Entered: Respondent's Motion to Dismiss is denied; Evidentiary Hearing required to determine factual issues; Clerk to set hearing; Merits of Petitioner's contentions will be deferred until after hearing (Att. copy to Petitioner, to Hon. Avon Williams and Hon. James C. Dale).

May 28, 1969 Filed: ANSWER of Respondent, c/s attached.

June 9, 1969 Filed: Brief of Petitioner, c/s attached.

June 17, 1969 Filed: Affidavit of Avon N. Williams, Jr. on behalf of plaintiff.

June 17, 1969 Filed: Affidavit of Mrs. Marie Hammons - on behalf of plaintiff.

June 17, 1969 Filed: Affidavit of Archie Nathaniel Biggers, Petitioner.

July 29, 1969 Order Entered: Evidentiary hearing - confined to issues set forth in order - to be set by Clerk. Attested copy to attorneys of record and to petitioner, Archie Nathaniel Biggers.

April 17, 1970 Order entered granting petition for writ of habeas corpus, and discharging the petitioner from custody after the state has had a reasonable time to retry him upon the same charge. Copy to attorneys of record and to the petitioner.

April 24, 1970 Motion to reconsider filed by respondent, with brief in support thereof. Certificate of service attached.

May 4, 1970 Order entered denying respondent's motion to rehear. Copy to attorneys of record.

May 11, 1970 Filed: Respondent's Notice of Appeal from Order entered April 17. Att. copy mailed to attorneys for Petitioner, Avon N. Williams and Nichael Meltsner.

In The United States District Court
Middle District of Tennessee, Nashville Division

[Title Omitted in Printing]

ORDER

(Received for Entry 2:30 P.M., July 1, 1968)

The Clerk is directed to file in forma pauperis the petition of Archie Nathaniel Biggers for writ of habeas corpus.

A copy of the petition and order will be forwarded to the Attorney General, State of Tennessee, Nashville.

The Respondent is directed to file his answer within the time allowed by law to show cause why the writ of habeas corpus should not issue. Respondent will submit affidavits in support of his position on all factual issues, and Petitioner shall have fifteen days thereafter to file his own affidavit in support of the allegations in his petition and to propound written interrogatories to the Respondent's affiants, or to file answering affidavits of other affiants. After such affidavits and any interrogatories have been filed with the Clerk, the Court will determine what further action is required.

/s/ Wm. E. Miller
UNITED STATES DISTRICT JUDGE

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

PETITION FOR A WRIT OF HABEAS CORPUS AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS

(Filed July 1, 1968)

TO: The Honorable William E. Miller
United States District Judge

I (Jurisdiction)

This is an application for a writ of habeas corpus to relieve the petitioner of restraint under a conviction imposed upon him by the State of Tennessee in violation of the Constitution of the United States. A United States District Court is authorized to entertain the application by 28 U.S.C. §2241(a) (1964).

II (Petitioner)

(A) Petitioner is a citizen of the United States and is a resident of the State of Tennessee. He is a pauper and because of his poverty, he is unable to pay the
[fol. 2] cost of this action and is unable to give security for same. Petitioner is currently imprisoned at the Tennessee State Penitentiary.

(B) Petitioner, a Negro, was found guilty of rape and sentenced to twenty years in prison in the Criminal Court of Davidson County, Tennessee on December 3, 1965. His conviction and sentence were affirmed by the Tennessee Supreme Court on January 12, 1967, 411 S.W.2d 696. Petition for rehearing was denied on March 1, 1967. A petition for a writ of certiorari in the Supreme Court of the United States was granted and the judgment affirmed

by an equally divided court, ... U.S. ..., 19 L. Ed. 2d 1267, 88 S. Ct., on March 18, 1968. A petition for rehearing was denied April 22, 1968.

III (Respondent)

The respondent in this action is Lake F. Russell, Warden of the Tennessee State Penitentiary, who has custody of petitioner.

IV (Circumstances of the Offense, Arrest, Identification, and Trial)

(A) On the night of January 22, 1965, Mrs. Margaret Beamer, a 39-year old Negro woman, was raped by an intruder. Brandishing a large butcher knife the assailant entered her house through a rear door, grabbed her from behind in an unlit hallway and threw her to the floor. Mrs. Beamer's attention was drawn to the attacker's knife and she was in fear for her life.

(B) Hearing her mother shout, Mrs. Beamer's 13-year old daughter ran into the hallway. She approached within a foot of the intruder, whose face was turned toward her, before being ordered back into her bedroom. The intruder then took Mrs. Beamer out of the house through an unlit kitchen up a railroad embank-
[fol. 3] ment to a nearby patch of woods there he raped her. The events surrounding the crime lasted from 10 to a maximum of 30 minutes.

(C) During the following seven months, the police requested Mrs. Beamer to look at police photographs on several occasions and although she identified the picture of one man who was not petitioner as "having features" like the rapist, the case lay dormant.

(D) During the evening of August 16, 1965 petitioner, a 16-year old Negro male, with no criminal record, was receiving medical treatment at Hubbard Hospital in Nashville, Tennessee where he had gone with his mother. They were accosted by a police officer who mentioned that a woman (Mrs. Silverman) had been assaulted in the Bordeaux area of Nashville, and sought to take Biggers to her home for attempted identification. On the officer's promise to return petitioner home immediately thereafter, his mother reluctantly agreed. The officer then took petitioner to Mrs. Silverman's home where she attempted to but could not identify him.

(E) Instead of taking petitioner home, the officer then took him to the Juvenile Court Building where he was kept outside in the car and questioned by officers for some time. Thereafter the officers charged him with the offense of loitering, took him into the Juvenile Court Building, and left him there with the night attendant. By this time it was dawn. He slept there until morning, when the police picked him up and took him to the Metropolitan Jail. There they questioned him about two hours, then put him in a cell.

(F) In the afternoon of August 17, petitioner was brought into the presence of Mrs. Margaret Beamer who identified him as the person that had raped her seven months earlier. Petitioner's mother and counsel retained by his mother after his arrest were not notified of or present
[fol. 4] at the identification proceeding. The circumstances of the identification were as follows:

(G) On August 17th the police went to Mrs. Beamer's home and brought her to the police station, telling her that they wanted her to "look at a suspect" in one of the rooms in the detective division. The police brought petitioner into the adjoining hall and then to the doorway of the room

in which Mrs. Beamer was seated. Mrs. Beamer was shown petitioner in the doorway in the presence of at least five policemen. Although a lineup could easily have been assembled, petitioner was presented as the only suspect. Mrs. Beamer asked the police to have petitioner speak, and the police instructed him to repeat words spoken by the rapist at the time of the offense: "Shut-up, or I'll kill you." Only after she heard him speak the rapist's words did Mrs. Beamer identify Archie Biggers as the man who had raped her.

(H) An August 17th edition of the Nashville *Tennessean*, carried a front page story of the Silverman assault and petitioner's arrest. Although not named, petitioner was described therein as a "burly-16-year old Negro." According to the article, he had been identified by the victim; the police were questioning him in connection with similar incidents and would confront him with victims of these earlier incidents. An August 18th edition of the paper showed a picture of petitioner entering jail and stated that he had confessed to attacking Mrs. Silverman; that Mrs. Margaret Beamer had identified him as her attacker, and that two other attempted rape victims could not identify him.

(I) At petitioner's trial the state initiated reference to newspapers accounts of petitioner's arrest in order to establish that Mrs. Beamer had identified petitioner before his photograph appeared on August 18th. The trial record does not show whether Mrs. Beamer had seen the first story in the Tennessean published on the [fol. 5] morning of the 17th. On information and belief, she saw that story.

(J) Petitioner was indicted for the rape of Mrs. Beamer on October 1, 1965 and tried two months later. At trial,

the only evidence connecting him with the rape was Mrs. Beamer's identification. Her thirteen-year old daughter testified to what she saw but was unable to identify petitioner as the rapist.

(K) On direct examination four of the five police officers who were present at the pre-trial identification described Mrs. Beamer's identification of Biggers at the police station. Petitioner's counsel objected that this testimony served to bolster the impact of the identification on the jury but the objection was overruled.[1]

(L) Petitioner testified in his own behalf and denied that he committed the act charged. He also told the jury that the police directed him to speak the words of the rapist and that Mrs. Beamer did not identify him until after he had spoken. Petitioner's mother, stepfather, and seven friends and neighbors testified that petitioner was an obedient and truthful young man of good reputation who had never before been in "trouble."

(M) In his summation, the prosecuting attorney characterized the issue in the case as one of identification. He repeated Mrs. Beamer's identification testimony and related a story concerning a case that he had tried, the point of which was that violence and terror result in accurate identification:

[fol. 6] In many parts of our United States, Gentlemen of the Jury, a case of this nature would

[1] Mr. Williams: ——that it is immaterial, —that I objected to on the other—it is immaterial and incompetent. She has already testified with regard to how identification —and that identification has to be weighed by the Jury on the basis of what she has testified, not on the basis of what—of this happened—a test to try to build it up by having about three or four police officers come in here and say, Why, yeah, I saw her identify him. That is not evidentiary, Your Honor.

> never go to trial, and I'm sorry to say, it's all south of the State of Tennessee, and that is because of this fine woman, Mrs. Beamer's environment, economic circumstances, and situation, she's not considered in those states to have any more rights than a dog and her reproductive organs —.

On the basis of Mrs. Beamer's identification the only evidence linking petitioner to the rape, the jury found Archie Biggers guilty and he was sentenced to the State Vocational Training School for Boys for twenty years.[2]

(N) The trial of the case began on November 29, 1965 and ended December 3, 1965. The selection of a jury entailed a voir dire of well over one hundred veniremen, and a special venire of one hundred-eleven prospective jurors had to be subpoenaed by the Court for December 1, 1965 in order to complete the selection of the jury. The majority of the veniremen admitted on voir dire that they had read newspaper reports about the arrest of petitioner on several charges of rape in the Fall of 1965. Some of those seated on the jury which tried the case admitted that they had read such news stories.

(O) At the time of trial petitioner had no real estate or other valuable property, and was unemployed, having been confined to jail since his arrest on August 17, 1965. His mother, Mrs. Flora Marie Hammons, likewise had and has no valuable property, and is and has been for many years a domestic servant earning approximately $37.50 per week. Petitioner has no father, having been born out of wedlock.

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[2] Although petitioner was originally sentenced to an institution for youthful offenders, he has been placed in the Tennessee State prison, a facility for adults.

(P) These facts relating to the indigency of Biggers were stated, in substance, to the trial judge upon the hearing of the motion for new trial in the case and also upon the hearing of a post-trial motion seeking a reconsideration of the trial court's action in denying a state-furnished transcript of the evidence. [fol. 7] The voir dire examination of prospective jurors alone would have required several hundred pages to be transcribed. Petitioner and his mother were unable even to pay for a transcript of the evidence itself, so that petitioner's counsel was compelled to advance payment for a transcript of the evidence. Counsel were unable to advance the sum necessary for transcription of the extensive voir dire and were therefore obstructed in the preparation of the motion for new trial and the appeal in this case, and forced to forego presentation of all issues of state and federal constitutional law arising out of the selection of the jury.

V (First Claim)

By presenting petitioner for identification without a lineup and without notifying his parents or retained counsel, and by making him speak the words of the rapist in the absence of circumstances justifying such a procedure, the State violated his rights under the Due Process Clause of the Fourteenth Amendment. This "showup" method of procedure was so impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification as shown, in part, by the following circumstances:

(1) Mrs. Beamer's identification of petitioner was uncorroborated.

(2) Her thirteen year old daughter was unable to identify petitioner.

[fol. 8] (3) Mrs. Beamer's opportunity to observe her assailant has been conceded by the State to have been "limited." She never saw him in direct light and could only observe him for from 10 to 30 minutes.

(4) Petitioner was described to Mrs. Beamer as a "suspect" by the police.

(5) He was compelled to speak the inflammatory words used by the rapist without opportunity being afforded for comparison.

(6) The gap between the crime and the identification was seven months.

(7) The State treated the jury in a manner which substantially impaired its capacity to appraise the identification objectively: newspapers were used as a forum for grossly prejudicial comment on the case; the jury was selected from persons exposed to this comment; the jurors were reminded of the harmful stories by the prosecution or voir dire and at trial; police officers were permitted to testify again and again to the fact of identification although it was not controverted; finally, the jury was subjected to a summation which the Supreme Court of Tennessee characterized as appealing to racial prejudice and which that Court found to be error, *albeit* non-reversible.

VI (Second Claim)

By compelling petitioner to speak the words used by the rapist and by introducing his speech as evidence of petitioner's guilt on direct examination, the State denied peti-

tioner's privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

VII (Third Claim)

By admitting in evidence the identification of petitioner, obtained as a result of a pre-trial confrontation [fol. 9] held while petitioner was unlawfully arrested, the state violated rights guaranteed to him by the Fourth and Fourteenth Amendments to the Constitution.

VIII (Fourth Claim)

By refusing to require the state to defray the costs of preparation of the transcript of evidence despite his plain indigency the state denied petitioner's rights under the Due Process Clause and Equal Protection Clause of the Constitution.

IX (Fifth Claim)

By affirming petitioner's conviction despite the inflammatory and prejudicial remarks of the prosecuting attorney in his summation to the jury suggesting that because prosecutrix was a Negro woman he would not have been brought to trial in states south of the State of Tennessee and relating her reproductive organs to those of a dog, Tennessee violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This argument was manifestly improper and calculated to unduly inflame and prejudice the jury and unduly motivate its conviction of defendant on bases other than evidence introduced in the case and on racial grounds.

X (Sixth Claim)

The totality of circumstances surrounding petitioners conviction especially, that there was absolutely no evidence connecting defendant with the offense except the insubstantial identification made by the prosecutrix and the prejudicial evidence to which the jury was exposed violated petitioner's right to a fair trial as protected by the Due Process Clause of the Fourteenth Amendment.

[fol. 10] XI

Petitioner has exhausted all available state remedies and no previous petition for writ of habeas corpus has been filed in this matter.

WHEREFORE, petitioner respectfully requests:

1) That a writ of habeas corpus be directed to respondent;

2) That respondent be required to appear and answer the allegations of this petition;

3) That petitioner be accorded an evidentiary hearing on the allegations of this petition;

4) That after a full and complete hearing petitioner be relieved of the unconstitutional conviction and sentence imposed upon him;

5) That petitioner be allowed such other, further and alternative relief as may seem just, equitable and proper under the circumstances;

6) That petitioner be allowed to file this petition without pre-payment of cost and that this proceeding be allowed *in forma pauperis*.

Dated: .....

Respectfully submitted,

AVON N. WILLIAMS
Charlotte at Fourth
Nashville, Tennessee

JACK GREENBERG
MICHAEL MELTSNER
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa. 19104

Attorneys for Petitioner

VERIFICATION

State of Tennessee)
) SS.
County of Davidson)

Archie Nathaniel Biggers being first duly sworn upon oath according to law, deposes and says that he has read the foregoing petition, and that he knows the contents thereof to be true except as to such matters as are stated upon information and belief and these he verily believes to be true and that he believes he is entitled to the relief sought therein.

/s/ Archie Nathaniel Biggers

Sworn to and subscribed before me this
18th day of June, 1968

/s/ Signature Illegible
Notary Public

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

MOTION TO DISMISS

(Filed August 6, 1968)

The petitioner was convicted in Davidson County for the offense of rape on December 3, 1965 and received a twenty (20) year sentence.

Certified copies of the technical record and bill of exceptions are attached hereto as Exhibits A and B respectively.

This judgment of conviction was duly appealed to the Tennessee Supreme Court and was confirmed by that Court in the reported decision of *Biggers v. State*, 219 Tenn. 553, 411 S.W.2d 696 (1967). The United States Supreme Court granted certiorari and affirmed by an equally divided court. *Biggers v. State of Tennessee*, 390 U.S. 404 (1968).

[fol. 2] The crux of the instant petition is that the petitioner was denied his Fifth, Sixth and Fourteenth Amendment rights regarding the circumstances of his identification by the victim. This issue has been fully considered and decided adversely to the petitioner by both the Tennessee Supreme Court and the Supreme Court of the United States.

It is further submitted that the petitioner's last three contentions, under the facts and circumstances of the instant case, simply do not rise to the dignity of a denial of constitutional due process. For the foregoing reasons, the respondent respectfully moves that the petition for writ of habeas corpus filed in this case be dismissed and denied.

/s/ David W. McMackin
DAVID W. McMACKIN,
Assistant Attorney General,
Supreme Court Building,
Nashville, Tennessee.

[Certificate of Service Omitted]

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

ORDER

(Received for Entry 4:15 P.M., May 12, 1969)

This action involves a motion by the respondent to dismiss the petition for writ of habeas corpus filed by Archie Nathaniel Biggers. The petitioner was convicted of rape in the Criminal Court of Davidson County, Tennessee, in 1965. The judgment was affirmed by the Supreme Court of Tennessee and then by an equally divided Supreme Court of the United States early in 1968. Biggers has now petitioned the Court for a hearing on his writ of habeas corpus, pursuant to 28 U.S.C. §2241.

Respondent maintains that the constitutional questions here raised by the petitioner have been fully considered and decided adversely to him by the United States Supreme Court. It is the position of the respondent that the Court should not, therefore, redetermine the same issues.

Though the present case has been argued before the Supreme Court, the decision of that Court is without force as precedent. When the Supreme Court is
[fol. 2] equally divided as to the outcome of a case, the judgment is automatically affirmed without opinion. Etting v. Bank of the United States, 24 U.S. 59 (1826). Had there been a more conclusive decision regarding the legal questions in the present case, the Court could easily decline any further review. There would be little reason for the Court to rehear arguments previously rejected by the highest judicial authority. But the Supreme Court did not settle the merits of this case, and affirmed only through an equal split in opinion. The Court therefore concludes that it is not precluded from hearing evi-

dence on the petitioner's allegations, and the respondent's motion to dismiss is hereby denied.

The Court being of the opinion that an evidentiary hearing is required to determine the factual issues in this cause, it is ORDERED that a hearing be set by the Clerk at the earliest time consonant with the Court Calendar. Any analysis of the merits of the petitioner's contentions will be deferred until after the evidentiary hearing.

/s/ Wm. E. Miller
UNITED STATES DISTRICT JUDGE

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

ANSWER

(Filed May 28, 1969)

The Respondent, Lake F. Russell, Warden, Tennessee State Penitentiary, for answer to the Petition for a writ of habeas corpus, filed against him in the above cause, says:

I.

Respondent admits that he is the duly appointed and qualified warden of the Tennessee State Penitentiary at Nashville, Tennessee, and that Petitioner, Archie Nathaniel Biggers, is presently therein confined, having been convicted of the crime of rape in the Criminal Court of Davidson County, Tennessee, on December 3, 1965, and having been sentenced to a term of twenty (20) years in prison. Petitioner's conviction was affirmed by the Tennessee Supreme Court on January 12, 1967, the opinion of such Court appearing in 411 S.W.2d 696. Subsequent to the denial by the Tennessee Supreme Court of a Petition for rehearing, a Petition for a writ of certiorari was granted by the Supreme Court of the United States and the judgment of the Tennessee Supreme Court affirmed by an equally divided Court, 19 L. Ed. 2d 1267, on March 18, 1968, after which decision a Petition for rehearing was denied.

[fol. 2] II.

Respondent denies that any rights of Petitioner were violated by the procedures employed by the Metropolitan Police Department in presenting Petitioner, then a suspect, to the victim of his crime. Petitioner here seeks to attack

the sufficiency of the identification evidence, a matter not appropriate for inquiry on Petition for writ of habeas corpus.

III.

Respondent denies that Petitioner's privilege against self-incrimination was in any way violated by his being asked to speak the words used by the rapist, and Respondent further denies that "such speech" was introduced on direct examination with the exception of the victim's testifying as to the words that the rapist spoke.

IV.

Respondent denies that the refusal of the trial judge to require the State to defray the cost of preparation of the transcript of evidence in any way denied any right of Petitioner since a hearing was held and it was determined that Petitioner was not an indigent.

V.

Respondent denies that any right of Petitioner was violated by alleged inflammatory and prejudicial remarks made by the prosecuting attorney since such remarks were immediately objected to by defense counsel, the trial judge just as immediately sustained the objection, and the prosecuting attorney forthwith abandoned that line of comment.

VI.

Respondent denies that Petitioner was denied a fair trial and again would point out to the Court that [fol. 3] the entire thrust of the petition for habeas corpus filed herein is an attack upon the sufficiency of the evidence adduced at the trial of Petitioner.

VII.

Respondent admits that Petitioner has exhausted all available state remedies but submits to the Court that for the reasons stated in the motion to dismiss hereinbefore filed that the petition for writ of habeas corpus should be dismissed.

Respondent further denies generally all things not hereinbefore specifically denied and having fully answered asks the Court to dismiss the petition for habeas corpus and to require the Petitioner to complete the service of his time.

/s/ James C. Dale, III
James C. Dale, III
Special Counsel
State of Tennessee
709 Nashville Bank & Trust Bldg.
Nashville, Tennessee 37201

[Certificate of Service Omitted]

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

AFFIDAVIT OF AVON N. WILLIAMS, JR.

(Filed June 17, 1969)

STATE OF TENNESSEE

DAVIDSON COUNTY

Avon N. Williams, Jr., after being duly sworn according to law, deposes and says:

That deponent is one of the counsel of record for the petitioner, Archie Nathaniel Biggers, in the above case and is a member of the Bar of the State of Massachusetts and Tennessee, the United States District Courts for the Eastern, Middle and Western Districts of Tennessee, the United States Court of Appeals for the Sixth Circuit, and the Supreme Court of the United States, and has been practicing lawyer in the State of Tennessee since 1948. That the document attached hereto marked Exhibit "A" is a true and correct copy of the transcript of the record in the above case filed in the Supreme Court of the United States during its October Term, 1967, as Case No. 237 on Writ of Certiorari to the Supreme Court of Tennessee, Middle Division, and that said transcript of the record contains a true and correct transcript of the record of trial in the above case before the Criminal Court of Davidson County, Tennessee, Division I, and of the proceedings on appeal in the Supreme Court of Tennessee. That the deponent has examined the petitioner's personnel record in the Juvenile Court of Davidson County, Tennessee, and that the said record shows he was arrested at 5:25 A.M. 8-17-65 on a technical charge of lottering issued from the Juvenile Court after (according to the affidavits of Mrs.

Affidavit of Avon N. Williams, Jr.

Flora Marie Hammonds and petitioner) having been seized about 11:00 P. M. at Hubbard Hospital by Metropolitan Detectives, submitted to Mrs. Carrie B. Silverman for an unsuccessful identification, and questioned at
[fol. 2] some length and for several hours in a car outside the Juvenile Court Building in the early morning hours of said day, before being turned over to the Juvenile Court at 5:25 A. M.

FURTHER DEPONENT SAITH NOT.

/s/ Avon N. Williams, Jr.

Sworn to and subscribed before me
this 16th day of June, 1969.

/s/ Mrs. Mavis W. Donnelly
Notary Public

Commission Expires: 7-29-69

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

AFFIDAVIT OF MRS. FLORA MARIE HAMMONDS

(Filed June 17, 1969)

STATE OF TENNESSEE

DAVIDSON COUNTY

Mrs. Flora Marie Hammonds, after being duly sworn according to law, deposes and says:

That she is 38 years of age and resides at 2106-A Scovel Street, Nashville, Tennessee, and is the mother of Archie Nathaniel Biggers, the petitioner in the above case. On 16 August 1965 said petitioner, then a 16 year old child, arrived home at approximately 10:00 P.M. with a cut on his arm. The deponent took him to Hubbard Hospital, Nashville, Tennessee, for treatment of same reaching the hospital at about 10:30 P.M. Upon her arrival, she noticed Metropolitan Police were already there in connection with another case. A Negro detective inquired how petitioner got his arm cut. The petitioner then told the detective about the dog chasing incident at 18th and Scovel wherein he fell and hurt his arm. The Negro detective asked deponent for permission to take petitioner back to 18th and Scovel at that time. Deponent agreed to this upon the detective's promise to bring the petitioner home immediately afterward. Deponent then went home and, when the policeman did not return the petitioner home, telephoned the Metropolitan Police Station where the Police personnel to whom she talked seemed to know nothing about the case. Finally, about 2:00 or 3:00 A.M., 17 August 1965, being extremely concerned,

deponent went to the Metropolitan Police Station and was there advised by the Police that petitioner was across town at the Juvenile Court Building, 2nd and Lindsley, Nashville, Tennessee. She immediately went to the Juvenile Court Building where she found the petitioner in the custody of Metropolitan Police Officers who refused to release the petitioner to his parent, the deponent, although to the best of the petitioner's knowledge,
[fol. 2] said police officers had no warrant for the petitioner's arrest or detention at that time. The police officers advised deponent that petitioner had stated he wanted to take a lie detector test the next morning because he had nothing to hide. Later that morning, 17 August 1965, deponent was telephoned by the Metropolitan Police and requested to come down and take petitioner to a State building for the lie detector test. She arrived at the Juvenile Court Building about 8:00 A.M. that morning to find that the Metropolitan Police had already taken the boy from the Juvenile Court Building across town to the Metropolitan Police Station. At this time, deponent telephoned and engaged Mr. Z. Alexander Looby as attorney for the petitioner. Mr. Looby advised her not to have the child submit to a lie detector test. Deponent then immediately stated to the Metropolitan Police that petitioner was not to have a lie detector test on advice of his counsel and that the petitioner was being represented by Mr. Looby. Later that morning, deponent received a phone call from Mr. Looby advising her to return to Juvenile Court and pick up the petitioner since Mr. Looby had been informed the only charge against the child was a warrant for lottering. However, when deponent reached the Juvenile Court sometime late morning or early afternoon, the probation officer there informed her that the petitioner had been returned to the Police Station. When deponent returned to

the Police Station that afternoon (17 August 1965) she was informed by the Police that the petitioner had now been identified by a lady in Bordeaux on the charge of assault with intent to ravish and also by a Negro woman on a charge of rape and that he could not be released. Deponent was not at any time advised or informed by the Metropolitan Police or anyone else that the petitioner was being subjected or submitted to a show-up or any other identification procedures on 17 August 1965. Although the deponent was continuously seeking to obtain the release of the petitioner from the time when she first became concerned and called the Metropolitan Police Station about midnight or shortly thereafter on 16 August 1965, on to the afternoon of 17 August 1965, she was never informed by the Metropolitan Police of any charge against said minor child and that the only information that she received in that regard was that from her attorney about
[fol. 3] the lottering charge sometime after 8:00 A.M. 17 August 1965.

FURTHER DEPONENT SAITH NOT.

/s/ Mrs. Flora Marie Hammonds

Sworn to and subscribed before me
this 16th day of June, 1969.

/s/ Avon N. Williams, Jr.
Notary Public

Commission Expires: 8-7-71

PLAINTIFF'S EXHIBIT NO. 1
FILED: November 4, 1969
CASE NO. 5120
BRANDON LEWIS, CLERK
BY /s/ Guy W. Cooper, D.C.

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

AFFIDAVIT OF ARCHIE NATHANIEL BIGGERS

(Filed June 17, 1969)

STATE OF TENNESSEE

DAVIDSON COUNTY

Archie Nathaniel Biggers, after being duly sworn according to law, deposes and says:

That he is petitioner in the above case and is now twenty years of age, having been born 14 January 1949. On 16 August 1965, he was on his way home in the evening between 9:00 and 10:00 P.M. when he was attacked by dogs at 18th and Scovel Street, Nashville, Tennessee, and cut his arm when he fell to the ground in process of chasing them off. On reaching home, he was taken to Hubbard Hospital by his mother, Mrs. Flora Hammonds, and there they were accosted by a policeman who asked how he had received his injury. The petitioner told the policeman about the incident at 18th and Scovel, whereupon the policeman and deponent's mother held a conversation which resulted in the policeman being allowed to take the petitioner with them. The Metropolitan Police Officers then put the petitioner in their car and took him to an area of Nashville known as Bordeaux and to the home of a Mrs. Carrie D. Silverman where they submitted him alone to Mrs. Silverman for identification. Mrs. Silverman attempted but could not identify the petitioner. However, instead of taking the petitioner home, the Metropolitan Police Officers took the petitioner to the Juvenile Court Building where they kept him outside in the car questioning him for a long time.

Thereafter the officers took him into the Juvenile Court Building and left him there with the night attendant. By this time, it was dawn. Petitioner slept there until morning and had breakfast about 7:30 A.M., after which the Metropolitan Police Officers picked him up and took him to the Metropolitan Jail where they questioned him about two hours and then put him in a cell. Later on that day they brought him down from his cell and submitted him alone to Mrs. Margaret Beamer, the prosecutrix
[fol. 2] in the above case, and to other women for identification.

FURTHER DEPONENT SAITH NOT.

/s/ Archie Nathaniel Biggers

Sworn to and subscribed
before me this 16th day of
June, 1969.

/s/ Avon N. Williams, Jr.
Notary Public

Commission Expires: 8-7-71

[fol. 1] **In The United States District Court**
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

ORDER

(Received for Entry 12:30 P.M., July 29, 1969)

In this habeas corpus proceeding, the Court remains of the opinion, expressed in its Order entered on May 12, 1969, that an evidentiary hearing is required to determine the issues in this cause. After reviewing the transcript and briefs, the Court desires open court testimony on the following matters: the nature of the "show-up" identification process as opposed to the "line-up" identification process, and why the former process was employed in the instant case; and, the general reliability of voice identification procedures, and their relative importance compared with other methods of identification in linking the petitioner to the offense alleged in the instant action.

It is ORDERED that an evidentiary hearing, confined to these issues, be set by the Clerk at the earliest time consonant with the Court calendar.

/s/ Wm. E. Miller
UNITED STATES DISTRICT JUDGE

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

ORDER

(Received for Entry 8:30 A.M., April 17, 1970)

In this habeas corpus proceeding, the Court issued an order on July 29, 1969, to the effect that an evidentiary hearing should be held to determine whether or not there were unconstitutional irregularities in the identification process employed by the police in the instant case. This identification procedure was the primary basis for petitioner's indictment. In ordering such a hearing, the Court was particularly concerned with the validity of the so-called "show-up" identification method as it was used by police and, also, the reliability and validity of voice identification procedures utilized in the instant case. A hearing on these issues was held on October 30, 1969, and supplemental briefs were filed by both parties to the action several weeks later.

Before reaching the merits of petitioner's claims, a brief statement of the facts is in order. Petitioner, Archie Nathaniel Biggers, when 16 years of age, was convicted on a charge of rape in a jury trial and sentenced to 20 years in prison. On appeal to the Supreme
[fol. 2] Court of Tennessee, the conviction was affirmed. *Biggers v. State*, ... Tenn. ..., 411 S.W.2d 696 (1967). The case was then accepted for review by the Supreme Court of the United States on a writ of certiorari. *Biggers v. Tennessee*, 390 U.S. 404 (1968). Again, the conviction was affirmed. However, the affirmation was the result of an equally divided court and, therefore, did not amount to an adjudication of the merits of petitioner's claims so as to prevent him from bringing the instant habeas corpus action. [See the May 12, 1969

Order entered by this Court in the instant case; and also see, *Etting v. Bank of the United States*, 24 U.S. 59 (1826).]

The pertinent operative facts in light of the issues raised in the current proceeding are as follows. On the evening of January 22, 1965, Mrs. Margaret Beamer was attacked at knife-point by an intruder who broke into her home. Mrs. Beamer's screams aroused her thirteen-year old daughter who rushed to the scene and also began to scream. At this point, the intruder is alleged to have said to Mrs. Beamer, "You tell her to shut up, or I'll kill you both." This Mrs. Beamer did, whereupon she was taken from the house to a spot two blocks away and raped. The entire episode occurred in very dim light and the rape itself occurred in moonlight. As a result, Mrs. Beamer could give only a very general description of her assailant, describing him as being fat and flabby with smooth skin, bushy hair and a youthful voice.

[fol. 3] Over a seven month period following the crime the police showed Mrs. Beamer various police photographs and had her attend several "line-ups" and "show-ups." However, the victim was unable to identify any of the persons shown to her as being her assailant. Finally, on August 17, 1965, petitioner was arrested as a suspect in the rape of another woman. While petitioner was being detained in connection with that case the police asked Mrs. Beamer to come to the police station to "look at a suspect." The identification process employed at this point was called a show-up. In this type of identification procedure, the suspect appears before the victim alone rather than in the company of others. The victim therefore does not have to attempt to choose one person from a group of persons presented to him, as in a line-up, but rather the victim knows that

the person presented to him for identification is one whom the police suspect of having committed the crime. At the instant show-up Mrs. Beamer identified petitioner as being her assailant. As to what transpired at the show-up, there is some conflict between the testimony given by Mrs. Beamer at the trial and that given by her at the evidentiary hearing held in this court on October 30, 1969. In testimony given at the trial, Mrs. Beamer testified that on viewing the petitioner the "first thing" that made her think he might be her assailant was his voice. However, at the October hearing, Mrs. Beamer testified that she identified petitioner positively prior to having him speak the words spoken by Mrs. Beamer's attacker more than seven months earlier during the crime—"You tell her to shut up or I'll kill you both." There is [fol. 4] also conflict between the testimony given by police officers at the trial and that given by them at the October hearing as to whether or not identification of petitioner was made before or after he was asked to speak these words.

At any rate, petitioner was identified at this show-up as being Mrs. Beamer's attacker, and the subsequent indictment and conviction of petitioner was based almost exclusively upon this station house identification.[1]

Turning now to a consideration of the legal consequences attaching to the identification process described above, the basic issue to be dealt with may be defined as follows: was petitioner subjected to a type of identification procedure, namely the show-up confrontation, which was so unnecessarily suggestive and conducive to irreparably mistaken

[1] There is considerable doubt on reading the trial record as to whether or not Mrs. Beamer made a positive in-court identification of petitioner at the time of the trial.

identification as to have the effect of denying due process of law to the petitioner? There are relatively few cases dealing with this issue and the validity of the show-up identification process in the light of due process considerations. However, the teachings of this small body of law point the way for decision of the issue now before the Court.

It is well settled that in the absence of exceptional circumstances any identification procedure, whether in the nature of a show-up or a line-up, employed without giving the suspect the right to have counsel present constitutes a denial of due process. *United States v. Wade*, 388 U.S. 218 (1967); and, *Gilbert v. California*, 388 [fol. 5] U.S. 263 (1967). Though petitioner in the instant case was not provided with the advice of counsel, the rule of *Gilbert* and *Wade* has no application here since that rule was not given retroactive effect. *Stovall v. Denno*, 388 U.S. 293 (1967). The *Stovall* decision makes it clear, however, that aside from the right to counsel, a suspect also has the right not to be subjected to police identification procedures which are so unfair, given the "totality of the surrounding circumstances," as to present a significant possibility of irreparably mistaken identification. Where such faulty procedures are employed, they present a "recognized ground for attack upon a conviction. . . ." See, *Stovall v. Denno*, *supra*, at 302; *Simmons v. United States*, 390 U.S. 377 at 383 (1967); and *Palmer v. Peyton*, 359 F.2d 199 (4th Cir., 1966). In light of these general principles, Mr. Justice Douglas succinctly stated the issue involved here in his dissenting opinion in the earlier consideration of petitioner's case by the Supreme Court of the United States. He pointed out that whether or not the procedure by which Mrs. Beamer identified petitioner denied him due process of law "must be evaluated in light of the totality of the

surrounding circumstances" with the view of determining if the procedure in petitioner's case "was so unduly prejudicial as fatally to taint his conviction." *Biggers v. Tennessee*, 390 U.S. 404 at 406 (1967).

The show-up identification process is, as the expert witness for petitioner testified, a far less re-
[fol. 6] liable method of identification than the line-up method. The fact that this is so has been given judicial recognition. In *Wise v. United States*, 383 F.2d 206 (D.C. Cir., 1967); and, *Wright v. United States*, 404 F.2d 1256 (D.C. Cir., 1968), it was stated that "the presentation of only one suspect in the custody of the police raises problems of suggestibility that brings us to the threshold of an issue of fairness." See also, *Biggers v. Tennessee*, *supra* at 407-408; and, *Stovall v. Denno*, *supra* at 302. See also, *Wall, Eye Witness Identification in Criminal Cases* 26-40, and Paul, *"Identification of Accused Persons,"* 12 Austl. L. J. 42, 44 (1938) (as cited by Mr. Justice Brennan in the majority opinion in *Stovall v. Denno*, *supra*.)

The problem intrinsic in the show-up identification process is perhaps best stated as follows:

> Whatever may be said of lineups, showing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police suspect *this* man. That carries a powerfully suggestive thought. Even in a lineup the ability to identify the criminal is severely limited by normal human fallibilities of memory and perception. When the subject is shown singly, havoc is more likely to be played with the best-intended recollections. *Biggers v. Tennessee*, *supra* at 407 (Justice Douglas' dissent.)

However, the use of the show-up process is not *per se* unconstitutional. Where special circumstances such as an urgent need for rapid identification are present, show-ups are allowable. For example, in *Stovall*, the Court found that the show-up was permissible and
[fol. 7] within the bounds of due process where the procedure was conducted in the hospital room of the victim who was at the point of death following a stabbing attack. Clearly, in that case, there was no time to conduct a line-up and the urgency of the situation demanded that if any eye-witness identification was to be obtained at all it had to be obtained by the show-up method. The "totality of surrounding circumstances" was such that the show-up was found to be permissible.

Aside from the urgent sort of deathbed situation which occurred in the *Stovall* case, thorough analysis of case law in the area reveals certain other sets of circumstances in which a show-up has been held permissible. For example, courts have upheld the constitutionality of the show-up where the witness had an unusually good and sustained opportunity to view the participants in the commission of the crime. The theory of the courts is that this particular circumstance makes it unlikely that a show-up would lead to misidentification. See, *United States ex rel. Gracia v. Follette*, 417 F.2d 709 (2d Cir., 1969); *Macklin v. United States*, 409 F.2d 174 (D.C. Cir., 1969); *United States ex rel. Rutherford v. Deegan*, 406 F.2d 217 (2d Cir., 1969); *Cline v. United States*, 395 F.2d 138 (8th Cir., 1968); and *Hanks v. United States*, 388 F.2d 171 (10th Cir., 1968). Show-ups have also been given court approval where the confrontation between the witness and the accused occurs "so near the time when the alleged crime was committed" that the chance of misidentification

[fol. 8] is minimal. The time period within which the show-up may be permissible ranges from a few hours to a few weeks. See, *United States ex rel. Williams v. LaValle*, 415 F.2d 643 (2d Cir., 1969); *Stewart v. United States*, 418 F.2d 1110 (D.C. Cir., 1969); *United States ex rel. Anderson v. Mancusi*, 413 F.2d 1012 (2d Cir., 1969) (suspect identified within hours of crime); *Clark v. United States*, 408 F.2d 1230 (D.C .Cir., 1968) (suspect identified within a few weeks and a "very positive spontaneous identification" by the witness); and, *Bates v. United States*, 405 F.2d 1104 (D.C. Cir., 1968). Also, where the show-up was conducted following other independent identification by the witness (i.e., photographic identification), or a particularly good description of the participant in the criminal act, courts have tended to approve the procedure. See, *United States v. Thompson*, 417 F.2d 197 (4th Cir., 1969).

While the show-up has been approved within the context of the four situations described above, the courts have zealously guarded the rights of the accused where the show-up procedure was conducted in a manner so suggestive and conducive to irreparably mistaken identification as to amount to a denial of due process. For example, a show-up was expressly disapproved where a witness was shown a lone suspect and asked, "Is this the man?" In this situation, the court stated that the words and actions of the police in contriving the show-up clearly indicated to the witness that the police thought this suspect had committed the crime, thereby contributing [fol. 9] to a "mutual reinforcement of opinion" likely to lead to mistaken identification. See, *Clark v. United States*, 294 F. Supp. 44 (D.D.C., 1968). In another case, a Circuit Court of Appeals upheld the holding of a federal district judge that a cell block confrontation

between a witness and a suspect was unnecessarily suggestive and therefore the identification obtained from the show-up could not be introduced at the trial. That show-up was objectionable on due process grounds because the suspect had been presented alone to the witness in a screened-off portion of the jail and the witness knew beforehand that the suspect was considered by police to be the culprit. See, *Clemons v. United States*, 408 F.2d 1230 (D.C. Cir., 1968); *and see also*, *United States v. Gregg*, 414 F.2d 943 (7th Cir., 1969).

In yet another case, a show-up identification was disallowed because the identifying witness did not have the opportunity to obtain a good view of the pargicipants in the crime. See, *United States v. Gilmore*, 398 F.2d 679 (7th Cir., 1968). The hesitancy of a witness to make a positive identification in a show-up has also been said to indicate the type of misidentification danger which would contravene constitutional requirements of due process.

These cases make it quite clear that while a show-up is constitutionally acceptable in certain situations, courts will look carefully at the factual situation surrounding the show-up to determine whether or not the procedure was conducted in such a manner as to violate due [fol. 10] process requirements. Courts also have looked to the surrounding circumstances to determine whether or not a line-up should have been conducted rather than the show-up with its attendant dangers of misidentification. For example, where police custody is involved, it has been held that the need for a formal line-up may not be circumvented by keeping a suspect away from the stationhouse until an informal show-up confrontation can be contrived. See, *United States v. Venere*, 416 F.2d 144 (5th Cir., 1969).

The *Stovall* case and the cases discussed immediately above make it clear that while the practice of showing suspects singly to witnesses for identification is widely condemned, each case of this type must be judged on its own facts and that convictions based on show-up identifications will be overturned only if the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. See, *Simmons v. United States*, 390 U.S. 377 at 384 (1967). Though the show-up is clearly a less reliable method of identification than the line-up, it is necessary in some circumstances and this Court does not subscribe to a rule that would prohibit its use as a matter of constitutional requirement. However, the "totality of surrounding circumstances" must be examined closely in this case to determine whether special circumstances or exigencies such as those described above existed which would warrant the use of the show-up instead of the more reliable line-up procedure.

[fol. 11] On this basis the Court must conclude that the circumstances here present are not such as to warrant the show-up procedure and, consequently, that its use at petitioner's trial denied him due process of law. Respondent, arguing in support of the use of the show-up procedure, relies chiefly on the contention that a show-up was actually fairer to petitioner than a line-up would have been since no prisoners were readily available in either the Metro Jail or the juvenile home whose general description matched that of petitioner. To have conducted a line-up under these circumstances, contends respondent, would have had a greater tendency to cause a misidentification because in a dissimilar group the physical characteristics of petitioner, whose general description matched that of

Mrs. Beamer's assailant, would have been unduly accentuated. This argument has perhaps some value but it is at best debatable. According to expert testimony produced by petitioner's attorneys, a line-up where no one had physical characteristics similar to petitioner would have been less preferable than one where members of the group all had certain similar characteristics but, in any event, would be preferable to a show-up. This conclusion is derived from the belief that any line-up would be a better test of the victim's memory since it would demand the exercise of some selectivity in identification. Furthermore, there is no indication that a truly concerted effort was made to produce suitable subjects for a line-up. Aside from a phone call [fol. 12] to the juvenile home and a screening of Metro Jail inmates no other efforts were made. There are several other prison facilities in the area and there is no evidence that any effort was made to screen them for subjects. The Court sees no reason why this could not have been done in order to maximize the fairness of the identification process. Here, there was no evidence of any deathbed urgency as in *Stoval* which would have precluded the police from delaying the identification procedure until a suitable line-up could have been arranged. The crime was seven months old, the victim was fully recovered and well, and there are no other indications that the ends of justice demanded an immediate show-up rather than a much more reliable line-up. Furthermore, none of the other circumstances which the above discussed cases indicate may justify a show-up existed in the instant case. The evidence clearly shows that the complaining witness did not get an opportunity to obtain a good view

of the suspect during the commission of the crime.[2] Also, the show-up confrontation was not conducted near the time of the alleged crime, but, rather, some seven months after its commission.[3] Finally the witness in the instant case was unable to give either an independent photographic identification of the suspect or a good physical [fol. 13] description of her assailant.[4] The nature of the show-up as conducted in this case—with the great lapse of time between the crime and the identification, the hesitancy of the witness in identifying the petitioner,[5] the circumstances of the stationhouse confrontation coupled with Mrs. Beamer's knowledge that petitioner was thought by police to be her assailant—tended to maximize the possibility of misidentification of the petitioner. True, it may have been more convenient for the police to have a show-up. However, in matters of constitutional due process where police convenience is balanced against the need to extend basic fairness to the suspect in a criminal case, the latter value should always outweigh the former. In this case it appears to the Court that a line-up, which both sides admit is generally more reliable than a show-up, could have been arranged. The fact that this was not done tended needlessly to decrease the fairness of the identification process to which petitioner was subjected.

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[2] The only other eye-witness, Mrs. Beamer's daughter could not identify Biggers. And see, the case of United States ex rel. Garcia v. Follette, supra and accompanying text and cases.

[3] See the case of United States ex rel. Williams v. LaVallee, supra, and accompanying text and cases.

[4] See the case of United States v. Thompson, supra, and accompanying text and cases.

[5] See United States v. Gilmore, supra, and accompanying text.

Due process of law and basic fairness demand that the most reliable method of identification possible be used in a criminal case. See, *Simmons v. United* [fol. 14] *States*, *supra*, at 383-384. The conduct of the show-up in this case created an atmosphere which was so suggestive as to enhance the chance of misidentification and hence constituted a violation of due process.

Clearly, this identification did not amount to a harmless error, since the victim's identification of petitioner was virtually the only evidence upon which the conviction was founded. See, *Chapman v. California*, 386 U.S. 18 (1966).

In view of this conclusion, the Court finds it unnecessary to reach the issue of whether voice identification as used here amounted in itself to a violation of due process. It may be that the validity of such identification should normally be left to the jury. Since the voice identification took place during the show-up and the show-up procedure itself is unconstitutional as employed in this case, there is no reason to reach the specific issue raised concerning voice identification.

Accordingly, judgment will be entered granting the application of Archie Nathaniel Biggers for a writ of habeas corpus, voiding the conviction obtained in the state court, and discharging the petitioner from custody after the state has had a reasonable time to retry him upon the same charge, any such new trial to be "unaffected by Mrs. Beamer's station-house identification and the testimony of the police officers who were present when it took place." *Biggers v. Tennessee*, *supra* at 409.

/s/ Wm. E. Miller
UNITED STATES DISTRICT JUDGE

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

MOTION TO RECONSIDER

(Filed April 24, 1970)

Comes the Respondent, Lake F. Russell, and moves the Court to reconsider its Order of April 17, 1970, in the above captioned matter insofar as such Order holds that the affirmance of Petitioner's conviction by an equally divided United States Supreme Court was not an adjudication on the merits of his claims so as to prevent him from bringing the instant habeas corpus action for the reasons stated in the accompanying memorandum brief.

/s/ James C. Dale, III
JAMES C. DALE, III
Special Counsel
State of Tennessee
706 Nashville Bank and Trust Building
Nashville, Tennessee 37201

[Certificate of Service Omitted]

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

ORDER

(Received for Entry 9:00 A.M., May 4, 1970)

Respondent in the instant case has filed with the Court a Motion to Reconsider. In so doing, respondent alleges that the Court erred in accepting jurisdiction over the instant habeas corpus matter and in deciding on the merits of petitioner's claims. Respondent's allegation of error rests on the proposition that the affirmation of petitioner's conviction by reason of the equal division of opinion of the United States Supreme Court when it heard petitioner's case in *Biggers v. Tennessee*, 390 U.S. 404 (1968), was an adjudication that "is as conclusive and binding upon the parties as if rendered upon the concurrence of all participating judges upon every question involved in the case." Respondent further contends that since the issues raised in this case have been thus "adjudicated" by the Supreme Court, the doctrine of res judicata should apply and the instant petition should have been dismissed by the Court.

[fol. 2] The issue raised by respondent's present motion may be stated thusly: In a habeas corpus proceeding, does an affirmation by reason of an equal division of opinion among the Justices of the Supreme Court amount to an adjudication between the parties which, even though no decision was rendered as to the merits of petitioner's claim, must be considered final in that the doctrine of res judicata would bar petitioner from raising the same constitutional claims in a subsequent habeas corpus petition?

After a thorough consideration of the case law relevant to the issue, the Court remains of the opinion expressed

in its Order of May 12, 1969, that the merits of petitioner's constitutional claims were left undecided by the equally divided Supreme Court and that the doctrine of res judicata does not operate in such a manner as to bar petitioner from raising those constitutional claims again as presented in his habeas corpus petition. It is generally true that when the Supreme Court is equally divided as to the outcome of a case, the judgment is automatically affirmed without opinion. *Etting v. Bank of the United States*, 24 U.S. 59 (1826). Furthermore, as respondent points out, there is a general rule to the effect that "an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged ...." *Hertz v. Woodman*, 218 U.S. 205 (1910); and see *United States v. Pink*, 315 U.S. 203 (1942); *Durant v. Essex Co.*, 74 U.S. 107 (1868); and, *Kaku Nagana v. Brownwell*, 212 F.2d 262 (7th Cir. 1954). However, the Court is of the view that the general rule espoused in the above cited cases cannot be [fol. 3] taken to stand for the proposition that a technical affirmation which results from the fortutious circumstance of an equally divided court and which makes no pronouncement, either pro or con, on the merits of the constitutional claims of a habeas corpus petitioner, must be protected by the doctrine of res judicata. The cases cited by respondent in support of his argument are unconvincing since they deal wholly with litigation concerning property rights[1] rather than the right of a criminal

[1] In cases involving contract rights, various property rights, tax liability questions, etc., there are overriding economic and administrative interests in seeing that finality is achieved in litigation so that "business can proceed as normal." The cases cited by respondent make this very clear. In **Hertz v. Woodman**, 218 U.S. 205 (1910) the Court was concerned with deciding who was entitled to the possession and enjoyment of a distributive

(Continued on following page)

defendant to due process of law where there is a possibility that his liberty or even his life may be forfeit. As the leading cases on the effect of affirmation due to an evenly divided court make clear, the principles of law which are argued in such a case are not decided but, rather, are left unsettled. In such a circumstance, the Court affirms out of necessity since, in its evenly divided state, it cannot overturn the lower court ruling. Such an affirmation is a technicality only, growing out of the policy of judicial administration that there must at some point
[fol. 4] be an end to litigation. See, *Etting v. Bank of the United States*, 24 U.S. 59 (1826).

It is inconceivable that a technical rule such as this, born to serve the needs of judicial administration, could be employed to deny a criminal defendant the right to obtain a full judicial determination of his constitutional claims in the federal courts. Certainly, it would amount to a travesty on justice if such a result were permitted. In the circumstances surrounding this case that travesty would be compounded by the fact that the even split of opinion occurred because of the necessity of Mr. Justice Marshall having to recuse himself apparently due to past professional association with petitioner's attorneys. The liberty of petitioner and others like him should not be left to the mercy of mere fortuity.

(Continued from preceding page)

share of an estate for tax purposes; in **Durrant v. Essex Co.**, 740 U.S. 107 (1868) the question involved rights in certain realty; in **United States v. Pink**, 315 U.S. 203 (1941) the Court was concerned with the disposition of surplus funds of a Russian insurance company; and in **Kaku Nagana v. Brownwell**, 212 F.2d 262 (7th Cir. 1954) suit was brought to recover stock vested by an alien property custodian pursuant to the Trading with the Enemy Act.

Fortunately, it has been recognized from early common law days to the present that such technicalities cannot be used to thwart the right of the criminal defendant to have the merits of his constitutional claim fully adjudicated. As the United States Supreme Court has recently stated: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders v. United States*, 373 U.S. 1 at 8 (1962).[2] Indeed, it has long [fol. 5] been recognized as a "familiar principle that *res judicata* is inapplicable in habeas proceedings." *Fay v. Noia*, 372 U.S. 391 at 423 (1962). If government is always to be accountable to the judiciary for a man's imprisonment, then access to the courts by way of habeas corpus must not be thus impeded. "The inapplicability of *res judicata* to habeas, then, as inherent in the very role and function of the writ." *Sanders v. United States*, *supra* at 8; and see e.g. *Fay v. Noia*, *supra* at 402; *King v. Suddis*, 1 East 306, 102 Eng. Rep. 119 (K.B. 1801); and, *Cox v. Hakes*, 15 A.C. 506 (H.L., 1890).

The Court is not persuaded by respondent's proposed interpretation of 28 U.S.C.A. §2244(c) dealing with the finality of determinations by federal courts in habeas corpus proceedings. As *Sanders* makes clear, §2244(c) was "not intended to change the law as judically evolved." Furthermore, "if construed to derogate from the traditional liberality of the writ of habeas corpus, ... §2244 might raise serious constitutional questions."[3] *Sanders*

[2] See Note 1 supra.

[3] See U. S. Const. Art. I § 9, cl. 2 which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it."

v. United States, *supra* at 11-12 and see, *Fay v. Noia*, *supra* at 406.

It should be made clear that while *res judicata* is inapplicable in habeas corpus proceedings, it is proper for a judge to deny subsequent applications for habeas corpus relief on the ground that the first denial had followed a full hearing on the merits. However, it should also be made clear that a judge is *permitted* to dismiss on such grounds and *not required* to order a dismissal
[fol. 6] by reason of any considerations of *res judicata*. See, *Salinger v. Loisel*, 265 U.S. 224 (1960); and, *Sanders v. United States*, *supra*.

The *Sanders* case is instructive as to the types of situations in which a judge may correctly elect to dismiss a habeas corpus petition on the ground that a previous hearing has disposed of the petitioner's claims on their merits. *Sanders* states that:

> "Controlling weight may be given to denial of a prior application for federal habeas corpus of §2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Sanders*, *supra* at 15.

and further that:

> "No matter how many prior applications for federal collateral relief a prisoner has made, [controlling weight may not be given to denial of prior application] if a different ground is presented by the new application [or] *if the same ground was earlier presented but not adjudicated on the merits*." [Emphasis added]. *Sanders*, *supra* at 17.

Looking to the facts here presented in light of the *Sanders* rule and the foregoing reasoning, the Court concludes that the prior hearing of petitioner's appeal by the United States Supreme Court did not determine the merits of petitioner's constitutional claim. Further, as the memorandum opinion issued by the Court on April 17, 1970, makes clear, the ends of justice have [fol. 7] been served by this Court in hearing petitioner's case and reaching the merits of the constitutional claims presented. The fact that petitioner's conviction was technically affirmed by reason of the United States Supreme Court's even division of opinion is of no consequence here since the merits of the claim were not adjudicated. Even if they had been adjudicated, *Sanders* shows that those claims would not have been automatically barred from consideration by this Court in a habeas corpus proceeding.

It occurs to the Court that there is yet another logical reason to support its decision to consider petitioner's claim. The United States Supreme Court hearing in the *Biggers* case followed the acceptance by the Court of a writ of certiorari to review the affirmation of petitioner's conviction by the Tennessee Supreme Court. The fortutous circumstance of an equally divided United States Supreme Court simply had the effect of leaving undisturbed without opinion the ruling of the State Supreme Court. Therefore, the instant habeas corpus petition is, in effect, an *initial* federal habeas corpus petition alleging error in a state criminal conviction. This being the case, the Supreme Court of the United States has recently established the proposition that notions of finality, such as *res judicata*, forfeiture, or waiver, cannot be applied so as to preclude the intial consideration of federal constitutional claims in a federal court. *Fay v. Noia*, *supra* at 428.

[fol. 8] Finally, it should be readily apparent that the situation presented in the instant case is highly analagous to the situation where a criminal defendant, after appealing his case to the highest state court, has had his conviction affirmed by that court and has subsequently sought relief by way of habeas corpus petition in a federal district court. The analogy may be drawn as follows. Due to the equal division of opinion among the Justices, the United States Supreme Court did not decide this case on its merits. Therefore, the Tennessee State Supreme Court is the highest court to have expressed an opinion as to the merits of petitioner's claim. That being the case, the Court is of the view that petitioner Biggers stands in essentially the same position as a criminal defendant who, having exhausted his state court remedies pursuant to 28 U.S.C.A. §2254, makes application for habeas corpus relief in federal district court. In such a situation, and in the instant situation, this Court has jurisdiction to fully adjudicate petitioner's constitutional claims since it is an unchallengable principle of law that in habeas corpus cases the ruling of the highest court of a state on a constitutional claim never bars consideration of the same constitutional issue by a federal district court. Principles of *res judicata* simply have no application in this situation.

[fol. 9] Accordingly, for the foregoing reasons the Court concludes that the technical affirmation of petitioner Biggers' state conviction by reason of the equally divided court does not foreclose this Court from disposing of the petitioner's constitutional claim on its merits. Therefore, respondent's Motion to Rehear should be, and the same is hereby, dismissed.

/s/ Wm. E. Miller
UNITED STATES DISTRICT JUDGE

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

NOTICE OF APPEAL

(Filed May 11, 1970)

Notice is hereby given that William S. Neil, Warden, Respondent above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the order sustaining the petition for the writ of habeas corpus, entered in this action on the 17th day of April, 1970.

May 7, 1970.

/s/ James C. Dale, III
James C. Dale, III
Special Counsel
State of Tennessee
706 Nashville Bank and Trust Building
Nashville, Tennessee 37201

A. 53

TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ARCHIE NATHANIEL BIGGERS,
Petitioner

Vs.

LAKE F. RUSSELL, Warden,
Tennessee State Penitentiary,
Respondent

FILED
JUN 15 1970
BRANDON LEWIS, Clerk
By L. M. Edwards, DC

CIVIL ACTION
No. 5120

BEFORE: The Honorable William E. Miller, Judge

TRANSCRIPT OF PROCEEDINGS

Nashville, Tennessee
November 4, 1969

[2]

APPEARANCES:

FOR THE PETITIONER:
Mr. Michael Meltsner
Suite 2030
10 Columbus Circle
New York, New York, 10019

FOR THE RESPONDENT:
Mr. James C. Dale, III
Bailey, Ewing and Dale
Nashville Bank and Trust Building
Nashville, Tennessee

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2	Curriculum Vita, Irwin Pollack, September, 1968	49	49

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TRANSCRIPT OF PROCEEDINGS

THE COURT: Call the case, Mr. Clerk.

THE CLERK: Case No. 5120, Archie Nathaniel Biggers v. Lake F. Russell, Warden.

MR. DALE: If the Court please, I think Mr. Meltsner has been introduced to the Court informally, but I thought I would take this opportunity to request his admission to practice before this Court. He is a member of the Bar of the State of New York, of the Supreme Court of the United States, of the Fourth, Fifth and Eighth Circuit Courts of Appeals, and I request his admission to practice before this Court.

THE COURT: All right, sir, glad to have you to participate in the case.

MR. MELTSNER: Thank you, sir.

THE COURT: We're glad to have you to participate in the case, and you will begin by giving me a short history of the case and a statement of the issues involved.

MR. DALE: Mr. Meltsner, do you think we better have our witnesses step outside?

THE COURT: How many witnesses are there?

MR. DALE: We have one in the courtroom, if Your Honor please.

THE COURT: Well, let the witnesses be excused

[5]

to the witness room, retire to the witness room.

(Whereupon, the witnesses were excused from the courtroom under the rule of exclusion.)

MR. MELTSNER: Briefly, Your Honor, this case was tried in the Criminal Court of Davidson County, in

1965. The evidence at that time showed that there had been a rape occurring in Nashville in January, 1965. The victim had been a Mrs. Margaret Beamer.

THE COURT: What's the name?

MR. MELTSNER: Beamer, B-e-a-m-e-r.

THE COURT: All right.

MR. MELTSNER: Some seven months subsequent to that rape, a police officer at the Hubbard Hospital saw a young man receiving medical attention for a cut on his arm, and the young man who is the Petitioner here, Archie Nathaniel Biggers, was with his mother at the hospital at that time. The date is August 16, 1965.

The officer then asked the boy's mother if he could take him back to the place on Scovel Street in Nashville where the young man had said that he had fallen while chased by dogs and been cut.

The young man was taken away by the police and subsequently lodged in the Juvenile Detention facilities here in Nashville for the rest of that night and sometime during the following day, the 17th of August, he was taken across

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town to the Metropolitan Police headquarters, and there was walked into a room in the homicide division where Mrs. Beamer was seated. There were also four or five police officers present. One of the police officers told Biggers to say, "Shut up or I'll kill you", words which had been spoken by the rapist seven months earlier. He spoke those words, and Mrs. Beamer identified him as the rapist.

At trial, her identification of him was the only evidence of Biggers' guilt. The only other state's witnesses, aside from a doctor who testified that there had indeed been a rape, were four or five of the police officers who had been

present, and they merely corroborated that Mrs. Beamer had in fact identified Biggers at police headquarters.

An appeal was taken from the conviction to the Supreme Court of Tennessee, and in that appeal, the character and circumstances of the identification were challenged on federal constitutional grounds. The Supreme Court of Tennessee affirmed, and the petition for writ of certiorari was granted by the Supreme Court of the United States. As Your Honor knows, that Court affirmed by an equal division of the eight sitting Justices, Mr. Justice Douglas writing a dissenting opinion.

Shortly thereafter, this petition was filed in this Court, but I do think it appropriate at this point to mention that subsequent to the affirmance by an equally-divided

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Court in Petitioner's case, the Supreme Court granted review in a case raising very similar issues, that being Foster v. California, and decided by a vote of five to four some of the circumstances which make an identification of this sort violative of the due process clause of the Fourteenth Amendment.

The claims presented to Your Honor by the petition and the answer are primarily whether the identification herein, under the totality of the circumstances doctrine, did in fact violate the Fourteenth Amendment; whether, and here I want to draw a rather fine distinction, but one I think is explicitly merited by the Supreme Court decision in Wade v. United States, whether the state use of what Biggers was required to say for purposes of identification at trial violated the Fifth Amendment as incorporated in the Fourteenth, in other words, whether the state is able to put on a witness who can say, as Mrs. Beamer did, he said, "Shut up or I'll kill you," at the pre-trial

identification proceeding when that testimony is compelled at the pre-trial identification proceeding.

THE COURT: Now at the actual trial itself, she did testify?

MR. MELTSNER: Mrs. Beamer?

THE COURT: Yes.

MR. MELTSNER: Yes, she did testify.

THE COURT: And did she identify the defendant at that time, or did she—was her testimony substantially

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the same as her statement at the pre-trial identification here?

MR. MELTSNER: As I read her testimony, Your Honor, it's quite plain that what she did was describe her pre-trial identification. At no time during the trial did she point him out in the courtroom. At no time did she say, it's that man over there, it's the second man from the right at the table, nothing of that sort occurred, and I believe Mr. Justice Douglas, in his opinion, drew the same conclusion from the record.

THE COURT: She identified him, in other words, from—on the basis of what he had said at the lineup?

MR. MELTSNER: On the basis of what he had said and also his physical appearance at the showup, at it's—

THE COURT: Showup?

MR. MELTSNER: As it's generally called.

THE COURT: Yes.

MR. MELTSNER: She told the jury what had happened in effect. She never identified him in the courtroom.

THE COURT: Now what is the distinction between a showup and a lineup?

MR. MELTSNER: Well, the literature generally draws the distinction that when a suspect is presented individually

for identification, that is called showup; when he is presented with additional persons so that there can be some comparison of sizes, shapes, voice and the like, that is

[9]

called a lineup.

There are two other claims which are before the Court briefed in our trial memorandum which we filed sometime ago. One is that the identification of the Petitioner was the fruit of an unlawful arrest, and the last is that some prejudicial remarks made by the prosecuting attorney was reversible error. The primary claims relate to the constitutionality of these identification procedures in the circumstance of this case.

Now on the basis of the petition and the answer, I think it's fair to state that there are no substantial differences between the parties as to the facts. Rather the parties differ as to the constitutional application of generally-agreed upon facts.

Thus today the Petitioner seeks to the extent possible to amplify and explore the meaning of the facts in this case as was described in this Court's order of July 29, 1969, where the Court states a desire to receive testimony on the following matters, and I quote:

> "The nature of the 'show-up' identification process as opposed to the 'line-up' identification process, and why the former process was employed in the instant case; and, the general reliability of voice identification procedures, and their relative importance compared with other methods of identification in linking

[10]

> the petitioner to the offense alleged in the instant action."

We have two witnesses who we would like to present with respect to these questions, but first I would like to move the admission of the transcript of record of the state court proceedings as reproduced before the Supreme Court of the United States and the affidavits of Petitioner, his mother, Mrs. Hammonds, and Attorney Williams, which are on file and which were authorized to be filed by this Court's order of July 1, 1968. I think that will shorten the—

THE COURT: Let's see, July 1st?

MR. MELTSNER: Yes, Your Honor entered an order at that time authorizing that affidavits be filed on behalf of the parties.

THE COURT: All right.

MR. MELTSNER: And in response to that, I believe we filed those three affidavits and the transcript of record.

THE COURT: All right. There's no objection to that?

MR. DALE: Not at all, if Your Honor please. I think the transcript, although I'm not certain that it is the one prepared for the Supreme Court, is already an exhibit in the answer of the Respondent in this case.

THE COURT: Well, as long as it is a full and

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complete transcript of the state trial procedures. You have one that you've tendered to the Clerk?

MR. MELTSNER: Yes, I believe one was tendered along with those affidavits, if I may look.

THE COURT: Well, let it be filed and file the affidavits.

MR. MELTSNER: May I have just a moment, Your Honor?

THE COURT: Yes.

MR. MELTSNER: I had thought that we had forwarded to the Clerk a copy of this which is the Supreme Court

transcript. Perhaps it's in the envelope.

THE COURT: Yes, might be in the envelope.

[MR. MELTSNER:] One of my witnesses has a copy of this.

THE COURT: Yes.

MR. MELTSNER: And I would appreciate, when he comes back, I would place that in evidence with the Clerk.

THE COURT: All right.

MR. MELTSNER: It's probable that what the Clerk has is the same, but as I am certain that the contents of this represents the entire record—

THE COURT: Well, let it be filed, the Supreme Court record—

MR. MELTSNER: Thank you.

THE COURT: —of the trial and these affidavits,

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Mr. Clerk.

THE CLERK: All right, sir. Exhibit 1 to the petitioner.

(PETITIONER'S EXHIBIT NO. 1 was marked for identification and filed.)

THE COURT: Now let's see exactly what posture we're in. The Supreme Court of the United States divided four to four, is that right?

MR. MELTSNER: That's correct.

THE COURT: And it was affirmed?

MR. MELTSNER: That's right, it was affirmed, but—

THE COURT: Now what are we examining here that has not already been adjudicated by the Supreme Court?

MR. MELTSNER: Well, the law has recognized, I believe, in one of Your Honor's previous orders in this case, that is—I can't quote the latin particularly well,

but that is an affirmance by a split decision is of no precedential value even in Petitioner's case.

THE COURT: All right.

MR. MELTSNER: Thus we are trying the constitutional issues here much as in any other habeas corpus petition, as if the Petitioner had never gone to the Supreme Court of the United States.

THE COURT: Yes. In other words, the hearing

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before the Supreme Court of the United States was from an appellate review from the highest court of the state?

MR. MELTSNER: That's correct, it was a review.

THE COURT: And this is an original application for habeas corpus in this Court?

MR. MELTSNER: Correct.

THE COURT: All right. Well, let's see what Mr. Dale has to say in response.

MR. DALE: If Your Honor please, I would like to take issue with two of the statements relating to the facts of this case, that Mr. Meltsner has presented.

In the first place, the State will show, and I think the transcript amply indicates, that Mrs. Beamer did not identify Biggers, the Petitioner in this case, until after—or she did identify him prior to his speaking the words that he was requested to speak.

Now he was in fact requested to speak the words to the effect, "Shutup, or I will kill you", but it is our position, and the transcript shows and the witnesses that the State has here today will show to the Court that in fact she identified him before he was compelled to speak those words.

In addition—this relates to an inference to be drawn from what is contained in the transcript—in no less than two places within the transcript during Mrs. Beamer's

testimony, she was asked first by the prosecutor, is there any

[14]

doubt in your mind, she said, there is no doubt. She was asked later on in the same testimony pertaining to her identification of Mr. Biggers, is there any doubt in your mind today? She said, no, there is no doubt.

So these are factual differences. I think that by and large Mr. Meltsner is accurate when he says that we agree on the facts, but I will not stipulate any fact that he wishes to—that we do not—we will prove our case today, if Your Honor please.

Now I would also like to state that I think that the major issue before us is the issue stated in Stovall v. Denno, after the Supreme Court indicated that Wade and Gilbert would not be retroactively applied. The Court there said that the issue was, or their area of inquiry was whether the confrontation conducted in this case was so unnecessarily suggestive and conducive to mistaken identification, that he was denied due process of law.

I think that's the sole issue in the case. I think requiring him to speak is, as in Schmerber, characteristic of identification. He was not required to say, "I am guilty". He was required to speak or asked to speak simply so that the tone or timber of his voice, if you will, if possible—

THE COURT: Were these the words that were alleged to have been uttered at the time of the rape?

MR. DALE: That's my understanding, some words

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similar to those.

THE COURT: And your proof will be directed to showing why this kind of lineup was used?

MR. DALE: We will get into that, yes, sir.

THE COURT: Showup instead of a lineup?

MR. DALE: Yes, sir, we will show, and I will state to the Court what our proof will show, this man, the Petitioner in this case, was sixteen years old. He was substantially larger, I believe, than he is now. I think he must have lost some weight, but in any event, he was about two hundred, two ten, over two hundred pounds, and over six feet tall at that time.

He was sixteen years old. If you put him in a lineup with juveniles, and of course he stands out because of his size; if you put him in a lineup with adults, he stands out because of his youth, so there was really no way a lineup could be held, and our proof will show that, but again, I don't think—I do believe that the only issue of constitutional proportions is the question of whether or not the confrontation was unduly suggestive.

THE COURT: Well, what was this—I haven't recently looked at the Supreme Court decision, but what was the split between the Court caused by? What was the issue?

MR. DALE: There is no—you mean in the Biggers case?

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THE COURT: Yes.

MR. DALE: There was no opinion.

THE COURT: No amplification or elaboration?

MR. DALE: The only elaboration was Mr. Justice Douglas' dissent.

THE COURT: And what was his dissent?

MR. DALE: His dissent, if Your Honor please, I read the case yesterday, but as best I recall, he simply said that lineups and showups, where not conducted superfairly, to coin a phrase, are unduly suggestive and violate due

process, and he would, of course, have reversed the conviction. I can't recall exactly what he said.

THE COURT: Well, something similar.

MR. DALE: But there was no opinion on the part of the four who voted to affirm, so we have no way of knowing what the actual split was.

Mr. Justice Marshall did not participate, which accounts for the lack of an odd vote.

I guess that is the State's position.

THE COURT: All right. Well, let's—suppose you call your first witness then.

MR. MELTSNER: Your Honor, I will do that. I wonder—I realize that you may wish to hear legal argument later, but I did want to point out one thing.

THE COURT: All right.

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MR. MELTSNER: And that is shown from page 205 of the Supreme Court record in this case, not only did a number of witnesses testify concerning the reliance of the witness, Mrs. Beamer, on voice identification, but the Supreme Court of Tennessee made such a finding in its opinion.

I just wanted to call that to your attention.

THE COURT: All right, you might pass that transcript up here.

MR. MELTSNER: This is my copy which is muchly annotated. Forgive me for that, it's had a long trip.

MR. DALE: Mr. Meltsner, how is the pagination on that? Does it conform?

MR. MELTSNER: In the beginning, it refers to both the state trial record and a printed version. In other words, the index describes two sets of pagination.

MR. DALE: I see.

MR. MELTSNER: We would call Captain McDaniel first.

WILLIAM A. McDANIEL, JR.,

a witness called to testify by and in behalf of the Respondent, after having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELTSNER:

[18]

Q Where are you employed?
A Metropolitan Police Department, Davidson County.
Q And what is your rank?
A Captain, Criminal Investigation Division.
Q And what was your rank in 1965, captain?
A I was a lieutenant.
Q How many years have you been a police officer?
A In March, be twenty-three years, sir.
Q And were you familiar with the 1965 rape prosecution of the petitioner, Archie Nathaniel Biggers?
A I am, sir.
Q You testified at his trial?
A Yes, sir.
Q Is that not correct?
A Yes, sir.
Q And am I correct that you were the highest ranking police officer directly involved in the investigation of that case?
A During this time, I was lieutenant in charge of personal crime, but I did have other higher superior officers over me to take the division.
Q In the detective division?

A Yes, sir.

Q Did you have a number of officers working under you?

[19]

A Yes, sir.

Q And in the investigation of this case?

A Yes, sir.

Q Now I want you to answer this from your experience as a police officer, when a suspect is shown alone to a witness for identification, that is generally called a showup, isn't it?

A Well, we don't use that term "showup". We—if we are going to have someone, we usually prefer a lineup.

Q You call it a lineup even if there is only one person?

A No, no. This particular case, we did not have a lineup. This is not what I consider as a lineup.

Q What would you call the kind of identification procedure employed in this case? Is there some police term for it?

A No.

Q The one-on-one identification?

A Not that I know of, sir, just under the circumstances, it was the only means that I could see that we could use.

Q Well, let me just ask you this, have you ever heard of the word "showup" before?

A I've heard of it, yes, sir.

Q And what did you understand it to mean?

[20]

A Well, just like I say, some use showup; I use lineup.

Q You thought showup meant the same as lineup?

A That's my interpretation, yes, sir.

Q But you do recognize there is something different between an identification procedure where one person is shown to a victim, and an identification where a number of persons are shown to the victim?

A There's a difference, yes, sir.

Q Let me ask you this, were lineups, and by lineups I mean a number of persons are shown to the victim, were they in use in Nashville in 1965?

A Yes, sir.

Q They were?

A Yes, sir.

Q But there was none in this case?

A No, sir.

Q Are you aware that many lawyers and scientists who have studied the matter in regard to lineup consider it a much fairer and less suggestive identification procedure than the showing of one man to a victim?

A Yes, sir, that's why I chose—

Q Would you speak up, please?

A This is why that—I understand the fairness of a lineup, and this is why I did not have a lineup for there

[21]

could not be fairness given to this person.

Q You didn't have a lineup because a lineup would have been unfair?

A Yes, sir.

Q And you think what you did was fairer than a lineup?

A Yes, sir.

Q Now let me ask you this, what is the approximate population of the Metropolitan jail, inmate population?

A Well, there's differences. Its capacity, I would say, could hold approximately four to five hundred people.

Q How many is that?

A Four to five hundred, that's my guess. I don't really know.

Q Well, how many are in there on an average day?

A Well, that's different also.

Q Your best estimate?

A Around a hundred, I'd say.

Q And was that about true in 1965?

A I couldn't say.

Q Well now, how about the Juvenile Detention facility here in Nashville, what's the approximate—

A It's entirely different today than it was at that time.

Q Well, what was the approximate population of

[22]

that facility at that time?

A Well, it was very small, because they didn't have large quarters, and again, as far as number, I would have to more or less guess.

Q Well, give me your best guess.

A I'd say with girls and boys both, would be fifty would be their maximum.

Q Now Nashville is the home of the Tennessee State Penitentiary, is it not?

A Yes, sir.

Q So that you had a number of persons who you could have selected for a lineup in this case in 1965?

MR. DALE: If Your Honor please, this is direct examination. I will object to leading.

MR. MELTSNER: Well, I think under Rule 43(b), Your Honor, I'm perfectly authorized to use leading questions.

THE COURT: All right, go ahead.

THE WITNESS: I didn't think so at the time, no, sir.

BY MR. MELTSNER:

Q But did you go through the Juvenile Detention facility on August 16, 1965?

A We—yes, we conferred with the judge, and as far as trying to get someone of this young man's stature, which

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there wasn't any available.

Q What judge?

A At that time, it was Judge Tatum.

Q Was any order entered of any kind in Judge Tatum's Court in this case concerning this matter?

A Of the lineup procedures?

Q That's correct.

A No, sir, there wasn't any order.

Q Did you ever inform Petitioner's attorneys that you had gone to Judge Tatum concerning the lineup?

A The District Attorney, no, sir.

Q Petitioner's attorneys?

A I didn't understand that, sir.

Q Did you ever inform Petitioner's attorneys in 1965—

A At that time—

Q —that you had gone—

A At that time, I don't think that he had an attorney, at the time we're speaking of.

Q Did you ever inform the attorneys that he had at trial?

He was represented by Mr. Looby and Mr. Williams at trial?

A That was at the trial.

Q And you know Mr. Williams and Mr. Looby?

[24]

A Yes, sir.

Q Did you ever inform them at any time that you had

gone to Judge Tatum?

A No, not that I can recall; they never asked me.

Q Did you testify at trial that you had gone to Judge Tatum?

A No, sir, never was asked.

Q And your testimony here today is that you went to Judge Tatum for the purpose of trying to find out if you could hold the lineup in this case?

A No. That's not what I said.

Q Would you then tell me what your testimony is?

A You asked me if at that time were we using a line-up procedure, which we were in 1965, and prior to that. We checked with the facilities of our Metropolitan jail trying to find, as far as, best, as far as stature, appearance, there weren't any available.

We also tried Juvenile Court, which that is where if we have a lineup, this is where we participate in the lineup is at the Juvenile Detention quarters, not at the police headquarters, so there was none available at Juvenile Court as far as appearance.

This is what we believe in. We try to get at least two people looking as much alike as possible.

Q So you recognized the lineup as a much fairer

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procedure?

A Yes, but at this point, we—

Q That's my question.

MR. DALE: May it please the Court, I don't care what Rule 43(b) says, he can't argue with this witness, and he has to let him answer.

THE COURT: He has to let him finish if he has a further explanation.

THE WITNESS: In my opinion, we could not have a

fair lineup by having a person with young features and yet a large body, we could not have given him a fair lineup. In the jail would have been older features, and at the Juvenile Detention would have been way smaller people.

BY MR. MELTSNER:

Q Did you try and enlist any citizens to appear in this lineup?

A Sir?

Q Did you try and enlist any citizens to appear in a lineup?

A No, sir.

Q Now, captain, let me ask you this. Petitioner was arrested on the night of the 16th of August, or the early morning hours of the 17th, am I not correct?

A Yes, sir.

Q And the lineup was held on the morning of the

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17th, is that correct?

A If you want to call it a lineup, yes, sir.

Q Or the identification procedures?

A Yes, sir.

Q So that your canvas of the jails took place the morning of the 17th?

A That's correct, sir.

Q And you do recognize that a full lineup would have been a fairer method of identification?

A Yes, sir.

Q In this case?

A If we can get a fair lineup, it is best.

Q That is standard operating procedure?

A Yes, sir, that is standard procedure.

Q Now, do you recall testifying at the trial in 1965 that an Officer Harold Woods told Biggers to say certain

words?

A Yes, sir.

Q Do you remember what those words were?

A I can vaguely remember, but I believe, shut up or I'll kill you.

Q And these words were spoken so that the victim, Mrs. Beamer, could hear his voice?

A Yes, sir.

Q So that she could decide whether or not he was

[27]

the man?

A She could identify his voice, yes, sir.

Q Let me ask you this. Why, as a police officer, with your many years of experience, why do you feel that the lineup is a more reliable procedure for identification than the sort of procedure which was used here?

MR. DALE: If Your Honor please, I'll object to that as—well, it's a question asking Mr. McDaniel what he feels. It also calls for a conclusion of some sort on his part. I think probably if rephrased, it—

THE COURT: Yes.

BY MR. MELTSNER:

Q Well, perhaps I can ask you on what basis you believe that the lineup is a superior and more reliable identification procedure than the one employed in this case, drawing upon your experience as a police officer?

A Well, let me—may I give an example, sir?

Q Surely.

A Say that we have a suspect that's redheaded, light features, light complexion. If we could have someone either in the build or a person that we know that looks—that's redheaded and also light complexioned, then we might put in blonde headed people, we will not mix—if this suspect is redheaded, we will not mix black, dark

brown haired people with redheaded.

[28]

When the person to identify says that the person that she wants to make a complaint about was redheaded, if we find two, three or four redheaded people who are there, approximately the same height, same build and all, and when you put them in a lineup, why then to me that is the true and fairest of all lineup procedures.

Q Now this crime had taken place about seven months before the identification, had it not?

A It happened in January, yes, sir.

Q And as I recall, it was at night?

A Yes, sir.

Q And there was a dimly lit hallway where the victim had been grabbed?

A That I do not know, sir.

Q Well, do you recall that the victim had identified the assailant as having a teenage voice, a young person's voice?

A I would have to look up her description; I can't recall it.

Q Do you recall how she described him physically, your best recollection?

A I would have to go to my notes, yes, sir.

Q Well, would you refer to your notes, please?

A All right, sir.

All right, sir, says his height was six feet

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tall, a hundred and eighty poinds, he was dark hair, medium or—medium to dark brown complexion.

Q Now are you willing to tell the Court today that there was no one in custody in the city of Nashville on

August 17, 1965, in the morning, who had any of those traits?

A I'm saying that there wasn't. What I'm saying, we didn't have one at Juvenile Detention quarters that looked young in face with a big stature. We probably had one big in jail, but not young features.

Q And you probably had some people whose features were young, but who weren't that big, is that correct?

A I'm not saying that, no, sir.

Q Well, is that possible?

A Our interest—

Q Is that possible that you had someone with young features?

A No, I'm not saying it was possible.

Q Are you saying it was not possible?

A I'm not saying it wasn't possible. I would not know about it, but whether we had a large man with young features, I know we didn't have that.

Q Did you go to every person in the cell blocks? Did you look at every person?

A I called back to the officer or superior officer whoever was in charge at this time, I do not recall, and asked

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them would they check their jail for a person of this description, which I do every time we have a lineup.

Q And you—

A Tell them what we want.

Q And you made no attempt to try to find someone in the community?

A No, I did not go outside of our building.

Q Let me ask you just one final question at this time. Mr. Biggers was arrested for the crime of loitering, as I recall, is that correct?

A Yes, sir, technical charge of loitering.

Q What was the character of the evidence against him for the technical charge of loitering?

A We had another complaint which he had already reenacted, and the loitering charge was more or less placed on him as a hold.

Q I see. Now this other complaint, was this a rape complaint also?

A Attempt.

Q And in other words, he was taken from the hospital where he was taken into custody to reenact the crime in front of another rape victim?

A No.

Q In front of a female who was claiming that she had been assaulted?

[31]

A No, sir.

Q Could you explain it then for me, because I'm not quite sure.

A This other victim was in the hospital, had been admitted to Baptist Hospital some two hours before Mr. Biggers arrived at the hospital himself.

Q This is the Hubbard Hospital?

A Hubbard Hospital, which he had multiple lacerations of arms and hands.

Q Now did you bring him to her for identification in the hospital?

A No, sir.

Q Well, how did he reenact the crime?

A He took the officers back to the home of this victim and showed them exactly what took place, where the woman was standing, how his arm went through the door, and so forth. The woman was not present.

Q The woman was not present?

A No, sir.

Q Now has the defendant ever been charged on this crime?

A Yes, sir.

Q Has he ever been tried on this charge?

A No, sir.

MR. MELTSNER: That's all I have.

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CROSS-EXAMINATION

BY MR. DALE:

Q Captain McDaniel, why in the course of preparing a lineup do you not go outside of the jail or outside of Juvenile Detention to get people to stand in as members of the lineup?

A This is something that, as long as I've been an officer, it just never has been done. We never have put off anything as—on the nature of this which we'll have to, either by news media of some type, request somebody to come in. We've never done this.

Q Isn't it because you can't account for the whereabouts of the people in the community, and one of them might just as well be the guilty party as the person who is the suspect?

A I never thought of it that way.

Q But isn't that a possibility?

A It's a possibility.

Q And so therefore you use people whose whereabouts you can account for?

A That's more so, if they do pick out other than the suspect, then we do know that this subject was in custody.

Q A lineup or a showup, as Mr. Meltsner has called

it, can also be beneficial to an accused, can it not?

A Oh, yes.

[33]

MR. MELTSNER: Now, Your Honor, I'm going to object to the leading questions at this point.

MR. DALE: Now, may it please the Court—

THE COURT: I think I'll permit him to cross-examine him.

MR. DALE: Thank you, Your Honor.

BY MR. DALE:

Q Now, Captain McDaniel, you were in charge more or less of the identification procedures, the examination if you will, of Mrs. Beamer, is that—

A Yes, sir.

Q Is that an accurate statement?

A Yes, sir.

Q When Mrs. Beamer was brought to the jail, did the police suggest to her that this is the man who did it, we want your identification of him, we've got to have it to make a case? Was there anything of that nature said to Mrs. Beamer during the course of that identification procedure?

A No, sir.

Q Would you describe for the Court, please, exactly what took place that night to the best of your—on that afternoon, I believe it was, to the best of your recollection?

A Mr. Biggers was in custody and at police headquarters. He was located in the detective bureau, in the office of Dr. W. J. Core, who is now deceased. When Mrs.

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Beamer was brought to headquarters, she was placed in the office now occupied by the sergeant of the detectives,

which Dr.—as far as directions, I will say Dr. Core's office is on the east side of the building, the sergeant's office on the west side of the building, which is not directly across from the office, but across the hall, but it's across the hall and a room down.

Q Would you say it's diagonally across the hall from—

A Yes, but you cannot stand and look in one office to the other; it's that far down.

Q I see.

A Mrs. Beamer, which there was another woman also in the room, plus myself.

Q Excuse me, captain, was this other woman also a victim of somebody?

A I've been trying—I didn't make any notes of it, and I can't truthfully say.

Q Can you answer this, do you recall her having said anything during the course of the identification that Mrs. Beamer made of Mr. Biggers?

A I can't—

Q Okay, if you can't.

A I do not know who she was or—but I do know she was in there.

[35]

Q Okay. Excuse me, you were at the point—you had Mrs. Beamer and this other woman unidentified in that room. Now, if you will, proceed from there, please, sir.

A That is when I instructed Mrs. Beamer what was to take place. I told her that there would be a person to walk down the hallway. If she could identify this person when he walked by the door and then proceeded back through again, which one side and down, and then when he come back, she could see the other side, that way he was led by two detectives which—

Q You say led by two detectives, you mean preceded, held on the arm, handcuffed to, or what do you mean by that?

A No, had one in front of Mr. Biggers and then one detective in the rear.

Q Were both of these gentlemen—

A Just like three men, one behind each other.

Q Were both of these detectives in civilian clothes?

A Yes, sir.

Q Were they both colored?

A Yes, sir.

Q Go ahead, sir.

A Which, as they passed, and they come back, proceeded back to the room, then the officers come—Sergeant

[36]

Woods and Officer Bailey come back to the office where Mrs. Beamer was, and Mrs. Beamer—and then we asked her did you recognize anybody, and she said, yes, that was the person, the one, the biggest one was the one that had raped her.

Q Now is Sergeant Woods a fairly good-sized individual?

A Yes, sir.

Q How about Officer Bailey?

A Bailey is a medium—he's tall, but he's not quite as big.

Q Okay. Now you say Mrs. Beamer said, yes, I recognize the biggest one?

A Yes.

Q All right. Now did she say anything else at that point?

A She said, I would also like for him to repeat these words, which I think, shut up or I'll kill you, to try to see if I could identify his voice. I walked out of the office and

go and tell Sergeant Willis to bring Mr. Biggers to the doorway and have him repeat this. Then I step back into the room where Mrs. Beamer is, and when he comes to the door, he's facing her, facing both of us, and which Sergeant Woods then instructs him to repeat these words, which he did. Then he goes back to the room that he had just come out of, and Mrs. Beamer says, yes, she identified the voice also.

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Q Now there was also a chance, I suppose, in this type of identification procedure that she could also say that was not the man, is that not possible?

A That's possible.

Q Has that been done on occasions in your experience?

A Yes, I've had procedures like this before, and no identification.

Q Do you know of your knowledge whether Mrs. Beamer failed to identify a number of people that were brought before her or before whom she was brought?

A Yes, sir.

Q Had she ever identified another person?

A No, sir.

Q Now on this loitering charge, if I understand your testimony correctly, this was simply a technical charge to enable you to hold Mr. Biggers pending the investigation of the Beamer case?

A No.

Q Oh, excuse me. Go ahead and explain it.

A No, at the time the loitering was placed against him, which was placed at the Hubbard Hospital, this was a technical charge to hold him pending the complaint that happened that night, August the 16th.

Q The very night that he was brought in?

[38]

A Yes, sir.

Q And the night preceding the morning or the day that Mrs. Beamer identified him?

A And then the next day, by him being the description, general description that we had had several complaints, that is why we started calling these people in to view Mr. Biggers.

Q On what basis, Captain McDaniel, would you say it was fairer in this case to have—and I'll use Mr. Meltsner's term—to have a showup as compared to a lineup? In other words, a showup where you have one person?

A Well, this was strictly my—I say—well, my decision, which I couldn't—to me, this was the most fairest—I couldn't have put him in the Juvenile Detention quarters with small boys, to me that would not have been fair.

Q Can you say without qualification that you in fact considered the fairness of the lineup procedure in this particular case?

A As long as I've been in the detective department, which is 1955, I have never tried to make any suggestive matter, either orally nor by any lineup. I do not—

Q Now—excuse me.

A I do not like that, I want to be fair either way.

Q Can you then say—I'm sorry, I keep interrupting

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you.

A I'd rather see them tell me, no, this is not the person, than put in some suggestive matter.

Q Did you vary from that practice in the case involving the State of Tennessee v. Ardhie Nathaniel Biggers?

A No, sir.

MR. DALE: I think that will be all, if Your Honor please.

REDIRECT EXAMINATION

BY MR. MELTSNER:

Q Captain, you are being very tolerant of all of these badgering lawyers, especially me. I have just a few more questions here.

First of all, you mentioned that Mrs. Beamer had been shown other suspects in the several months after the rape.

A Yes, sir, several suspects.

Q Had you brought her down to the police headquarters?

A Yes, sir, she's come to police headquarters, and we've carried mug shots to her on numerous times, and I'm sure at some occasions, investigators have just picked up a suspect off of the street and carried to her, her home.

Q And showed them to her?

A Yes, sir.

[40]

Q There?

A Yes, sir.

Q So she is a permanent resident of Nashville, is that not correct?

A Yes, she's—as far as I know.

Q And she's been freely available to the police department and cooperative in this case?

A Yes, sir, real cooperative.

Q Now you mentioned the technical charge of loitering and I'm not quite clear about what that means. Is it a fair statement to say that he really wasn't loitering, but this was a charge put on to hold him?

A That's a charge at that time—which we do not use it today—but in that year, why we were just like a vagrancy, on juveniles, we would use the term of loitering, and on the adult, we would use the charge of vagrancy.

Q And you used a charge of loitering even though he was taken into custody while he was receiving medical treatment?

A That's right. We could have charged him with the curfew law, which we had at that time, but we did not.

Q You could have charged him with a violation even though he was with his mother?

A He wasn't with his mother.

Q Did you pick him up at the hospital?

[41]

A No, I didn't personally.

Q Now let me ask you this, you stated that you made this decision about holding the kind of identification proceeding that was held in this case. Were you guided by any rules or regulations of the department which specifically deal with this matter?

A No, sir. We have—like I said, we've used this method before, and we've used lineup procedures which I've always stated was to me the most fairest, if we can get the general build, and I've had it both ways. I've had them say, yes, this is the person; no, this is not the person, and especially in checks, bad check writing, we've used one person showup, as you refer to it, very successfully.

Q So you use a great number of showups?

A During that time, yes, sir. Not today.

Q Would you say that showups were used more often than lineups?

A No, sir.

Q Lineups were used about the same as showups?

A More, I would say.

Q Let me ask you this. Do your notes reflect the time of this identification?

A This identification was—I don't have it down, but it was made—I'd say right in the afternoon, early afternoon.

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Q Around noon or thereabouts?

A Yes, sir, I'd say twelve to one o'clock.

Q And am I correct in stating that Archie Nathaniel Biggers was dressed in the same clothes that he was wearing when he was brought in?

A Yes, sir, I'd say that. I'm not positive; I wasn't present when he was first brought in.

Q Well, he has informed me that he was wearing the clothes that he had worked in at a service station, and I just wonder whether you recall whether or not that was the case?

A Yes, sir, he worked at Red Ace Service Station which they had lapels showing Red Ace and also his—I think his——

Q These are workmen's clothes?

A Working clothes, khaki, I believe.

Q And Nashville police officers don't dress quite that way?

A No, I didn't say they were dressed alike, which these officers, Mrs. Beamer knew them, for they went and brought her up there.

Q I see. These two officers were the ones?

A Yes, I did not use them as lineup, could not use the officers and Mr. Biggers as a lineup, didn't want her to distinguish between whether the two officers were to be

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used for she knew these officers.

MR. MELTSNER: Thank you. Thank you, Captain.

THE COURT: Now let me clarify one or two little matters.

The crime itself occurred on what date?

THE WITNESS: January the 22nd, 1965.

THE COURT: And when was the petitioner, the defendant in the state court, when was he first apprehended, taken into custody, or charged?

THE WITNESS: August the 16th, 1965.

THE COURT: August 16th?

THE WITNESS: Yes, sir, approximately 11:30 p.m.

THE COURT: And how was he dressed at that time?

THE WITNESS: He was—like I say, I did not see him at that time, but I'm pretty sure he had on the same clothing at seven o'clock the next morning when I arrived as he had on at eleven o'clock that night.

THE COURT: Well, what is——

THE WITNESS: When I saw him, he had on work clothing, which was——

THE COURT: Well, when he was in the showup, that's August 17th?

THE WITNESS: Yes, sir.

THE COURT: How was he attired at that time?

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THE WITNESS: The same.

THE COURT: With work clothes on?

THE WITNESS: Work clothes on, yes, sir.

THE COURT: And that had the Red Ace on it, you say?

THE WITNESS: Yes.

THE COURT: Service station?

THE WITNESS: He worked for Brooks Red Ace Service Station.

THE COURT: How was he described at the time of the crime as far as the witness——

THE WITNESS: As far as dress?

THE COURT: Yes.

MR. DALE: If Your Honor please, this was seven months before, unless you're referring to the second——

THE COURT: The crime was January 27, 1965?

MR. DALE: Yes, sir.

THE COURT: Did she testify how he was dressed at that time?

THE WITNESS: Let me——

MR. MELTSNER: I don't believe the state record says anything about that.

THE COURT: All right.

MR. DALE: She is here, if Your Honor please, and we'll——

[45]

THE COURT: She's going to testify?

MR. DALE: Yes, sir.

THE COURT: All right.

THE WITNESS: She gave a statement at that time, on January the 22nd, if I can just glance over this, she might have——

THE COURT: This occurred at night in some apartment house, is that right?

THE WITNESS: No, this occurred——

THE COURT: Tenement house, apartment house, or what was it?

THE WITNESS: She was at her home, sir, and was taken from her home out down the railroad track near the intersection of Alpine Street, this is where it happened.

THE COURT: Taken from her home?

THE WITNESS: Yes, sir. Her young daughter was

present and more or less the scare he placed on her that if you didn't make your daughter quit screaming, I'll kill her, and then he led the woman out the door.

THE COURT: All right.

BY MR. MELTSNER:

Q The daughter was present at this identification proceeding?

A Well——

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Q She was present at that time?

A Sir?

Q The daughter was present in August at this identification proceedings?

A No.

Q She was not?

A No, she was not present.

Q Did she not testify at the trial that she could not identify Mr. Biggers as the rapist?

A I'm not familiar with that, but I believe I heard someone say that.

Q If the record revealed that——

A If the record shows it, that's what happened.

Q And that would be generally true about your testimony. You certainly had a much better recollection of all of these events at the time of trial, did you not?

A See, I couldn't sit in the trial, I don't know what each one of them testified.

Q I see, but as to your own testimony, you surely had a fresher view on the matter at that time, did you not?

A Oh, yes, sir.

MR. MELTSNER: Thank you.

THE COURT: All right, that's all.

WITNESS EXCUSED

THE COURT: Call your next witness.

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MR. MELTSNER: Dr. Pollack.

(The witness was sworn.)

THE CLERK: State your name, please.

THE WITNESS: Irwin Pollack.

THE CLERK: Just have that seat.

MR. MELTSNER: Your Honor, I intend to present expert testimony, and I do intend to qualify him by asking questions about his background and degree, and after asking a few of these questions, I hope the Court will receive in evidence a curriculum vita.

THE COURT: What is his specialty?

MR. MELTSNER: He is an experimental psychologist.

THE COURT: Ask him a few preliminary questions.

MR. MELTSNER: Let me state for the record that Mr. Dale has a copy, and I believe agrees to it.

DR. IRWIN POLLACK,

a witness called to testify by and in behalf of the petitioner, after having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELTSNER:

Q Would you state your occupation?

A I am a professor of psychology at the University

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of Michigan, and research psychologist in the Mental Health Institute at the University of Michigan.

Q Would you state briefly to the Court the nature of

your work as a psychologist and your field of specialization?

A I primarily carry out research in the field of auditory perception, hearing. I also teach in the department of psychology at the University of Michigan.

Q Now would you describe for the benefit of the Court some of your experience on committees in your specialty, and if you have consulted with government, any experiences doing that.

A Before I went to the University of Michigan, I worked for fourteen years for the United States Air Force where we worked primarily in the area of speech communication. I now serve on a working group of the National Academy of Sciences. It's called the Committee of Hearing and Bio-Acoustics which advised the Department of Defense with respect to questions associated with identification.

I'm presently spending most of my time on a research project of the National Science Foundation where I carry out fundamental research in the field of hearing.

Q Have you published in this field?

A Yes, I have.

Q Would you briefly describe some of your

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publications?

A Most of my publications are in the Journal of the Accoustical Society of America. They number between ninety and a hundred, I would guess. They are concerned primarily with hearing and speech perception.

Q And have you conducted experiments?

A Yes, I have, for the past twenty-three years, and I am presently conducting experiments in this particular area.

MR. MELTSNER: Rather than continuing to bring out

Dr. Pollack's credentials, Your Honor, I ask that the statement of his background be introduced into evidence, and that he be qualified as an expert.

THE COURT: Yes, let it be admitted; he qualifies.

THE CLERK: Exhibit 2.

(PETITIONER'S EXHIBIT NO. 2 was marked for identification and filed.)

BY MR. MELTSNER:

Q Now, Doctor, have you read a document entitled "Transcript of Record, Archie Nathaniel Biggers v. Tennessee," in the Supreme Court of the United States?

A Yes, I have.

Q And are you familiar with it?

A Probably not to the extent to which you lawyers peruse your documents, but I've gone through it in fairly

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conscientious detail.

Q Thank you. On the basis of your reading of this document, were you able to form an impression as to the procedures underlying Mrs. Beamer's identification of Archie Nathaniel Biggers?

A Yes, I was.

Q Now——

MR. DALE: May it please the Court—excuse me, Mr. Meltsner—I don't know whether from reading that document anybody can form—unless he is trained in the law or in police work—can form an impression of identification procedures.

Now Dr. Pollack may very well be an expert in audio or bio-acoustical work and psychology and so on, but I don't see how, from a simple reading of the transcript, that he could form an impression and then testify as an expert on it as to an identification procedure.

MR. MELTSNER: Your Honor, I'm asking the witness to testify as to his opinion of the reliability of the procedures employed as revealed by this record. Now counsel has the opportunity on cross-examination to bring out anything he wants about the assumptions underlying his testimony.

THE COURT: Well, I'll go ahead and receive the testimony, and then I'll assess it at the proper time

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and evaluate it.

BY MR. MELTSNER:

Q Would you state what opinion you have formed as to the reliability of the procedures underlying this identification?

A I am concerned with several aspects of the process of identification in this particular case. I believe it's called in the legal terminology sort of one-for-one on identification rather than an identification from among a lineup, and that is the particular aspect I'm most concerned about, but there are many other aspects which I've gleaned from the record which make me concerned with respect to this particular identification.

Q What conclusion have you drawn, based on this concern, as to the reliability of these procedures?

A I come to the conclusion that there are many factors which are prejudicial with respect to the defendant in this identification process as revealed by the transcript.

Q Now what aspects of the process have led you to that conclusion?

A I've already mentioned the one-for-one confrontation. I'm concerned with respect to the very long time lapse between the initial act and the time of identification.

May I consult with some notes that I made going through this, Your Honor?

THE COURT: Yes.

THE WITNESS: I'm also concerned that the defendant was identified as a suspect to the person making the identification, and that he was requested to utter a specific statement which had some obvious emotional connotations, and that the complainant was surrounded by police officers perhaps intent in finding for a particular suspect.

All of these things tended to—I would think, in my opinion, for the complainant to identify the particular subject as the subject in question.

BY MR. MELTSNER:

Q Now how would the one-on-one identification procedure lead to that tendency? In other words, what is it about the one-on-one identification procedure which leads you to conclude that there was a great deal of prejudice here?

A May I digress for just a second, Your Honor?

In experimental tests, we try to distinguish between what we call a forced choice procedure and the yes/no procedures. In a forced choice procedure, basically, the task of the subject is to pick one of several objects, in this case several persons, pick one of that group which is the most likely, and in the experimental laboratory, we always include one true case among several false cases, so that we can, in effect, test the veracity of the person making the identification.

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So that is called forced choice. It has the very nice feature that we can, at the same time of giving the test, we can determine the accuracey of the identification.

But this of course is not possible in its true extent, although the lineup attempts to get this, that particular direction, because you are asked to make a choice, and it is

possible for the complainant to pick somebody other than the particular suspect at hand.

Yes/no procedure in the laboratory is a situation where the subject under question makes a judgment. Is this — has a signal been presented, has an object under investigation been presented, yes or no. It's easy to show that for a given signal, for a given object, you can get the person to say yes maybe ninety-nine percent of the time, or yes one percent of the time under the exactly same experimental conditions by just changing the conditions for payoff in this particular situation.

The case that is — I can try to illustrate this, this is the problem of a sonar operator on board a ship. He hears a signal, and he has to inform his captain whether indeed this is some enemy object there. Now if the conditions are that by reporting yes, he doesn't prejudice the integrity of his own ship, that is, no action has to be committed as a result of that directly, then he will report anything that's suspicious, so he will say yes more often, because it's much more important not to miss an actual target if a target appears than to say

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yes when indeed there was no target.

On the other hand, if, as a result of his saying yes, the captain has to expose his ship immediately so that there is a grave danger that if — there's a grave danger if he says no — if he says yes, indeed there's no target, then he will be in a very dangerous situation.

Q Now, do I understand the burden of what you're saying as applied to this case, that procedures which suggest a particular result will tend to lead to a positive identification of the person presented?

A In the yes/no situation, this is indeed the case, yes.

Q Now you've mentioned some other factors which supported your general conclusion of unreliability, and I would like to comment about some of those. You mentioned the time lapse. How does the time lapse tend to produce an unreliable identification?

A We all know about the fallibility of human memory. One of the standard experiments in a general psychology course is, during the first lecture, perhaps in front of four or five hundred students, some act takes place in the midst of the lecture, and at the end of the lecture, or perhaps right after the act takes place, the students are asked to report what happened, and the discouraging thing here with a visual identification right in the midst of the student, often

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in very dramatic circumstances, you'll get a hundred percent different answers.

The fallibility of human judgment, coupled with the fact that a very long time lapse was —took place in this particular case—I was not able to tell from the record whether the features of the voice that were identified by the complinant were brought out immediately upon her initial complaint or only in the subsequent testimony.

Q Well now, with respect to this reliance on the voice, why does reliance on voice identification in a one-on-one situation of this sort tend to produce an unreliable identification?

A I'm sorry, could you please repeat? I was ——

Q Why does reliance on voice produce or tend to produce an unreliable identification? What is it about the voice that makes it particularly difficult as a means of identifying a person.

MR. DALE: If Your Honor please, I don't think that

the rule permitting Mr. Meltsner to lead applies to this witness, and I would therefore object to this.

THE COURT: Well, try not to lead him.

THE WITNESS: I'm concerned that in effect the subject's auditory memory of what was said changes with time. That is unlike a photograph which doesn't depreciate with time or disintegrate with time. Our

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subjective memory of a particular auditory event does indeed decay with time so if you ask me what is it about the voice that relates to this long-term memory, it's the impermanence, if you will, of the mental copy of what was said, and so that—and we know from experiments that the fallibilities of identification will indeed increase with time.

BY MR. MELTSNER:

Q Have there been experiments done by you or other social scientists which support your conclusion?

A I have a bibliography of voice identification here. This was furnished to me by Professor Arthur House of the Department of Speech Sciences, Purdue. It contained approximately twelve references. Included among these references was a study which I have performed, perhaps the very first in this area, of voice identification under controlled, experimental conditions.

Q I'm not going to burden the record with that bibliography, but could you summarize the general conclusions of the authors there?

A The general conclusions?

Q About voice identification.

A Is that voice identification is a fallible form of identification, that is to say the accuracy of voice identification can achieve any one of a range of scores depending

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upon the particular conditions under which it is examined, but it is never infallible.

Q Would you compare it in any way with something like fingerprints?

A Oh, there's nothing like—it has nothing like the specificity and integrity of fingerprints.

Q Would you say it has less specificity than physical identification?

A By physical, you mean sight?

Q Yes.

A I would tend to think that because so many more cues that might be available in visual identification, that visual identification would be somewhat more reliable.

Q Let me read you a statement, and then I'm going to ask you whether you find it correct.

"Where the identification is by voice alone, the absence of some comparison involves grave danger of prejudice to the suspect."

MR. DALE: If Your Honor please, I believe that's a quote right out of either Wade or Gilbert.

MR. MELTSNER: It's Palmer v. Peyton.

MR. DALE: Palmer v. Peyton, and I think this calls for more than an expert conclusion on the part of this witness. It's possibly a legal conclusion, and I therefore object.

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THE COURT: This is out of a Supreme Court opinion?

MR. DALE: No, out of a Fifth Circuit.

MR. MELTSNER: No, it's a Fourth Circuit which the Supreme Court cited with approval in Stovall v. Denno.

THE COURT: Well, I'll let him answer.

BY MR. MELTSNER:

Q Did you find that statement to be correct?

A I feel there are certain legalistic aspects I am being called to answer, and to that extent, I disqualify but to paraphrase the statement in my own terms, to rely solely upon a voice identification, I would be very uncomfortable.

I base this on the simple testimony, when my daughter calls me on the telephone, I have two daughters, and I can't tell which one is speaking for quite sometime.

Q Your testimony, would it be any different, however, if there were no voice identification in this case, would you still conclude as you had concerning the reliability of this identification?

A With respect to the features of a long-time lapse, with respect to the features of a sort of one-on-one confrontation, with respect to the features of a subject being identified as the suspect, these are all factors that are not specific to voice identification, although voice identification,

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I would feel, is unusually susceptible under these circumstances.

Q And these factors led you to what conclusion? Would you state your conclusion, if it were just based on those factors as to the reliability of the procedures?

A The procedures leave a lot to be desired. I should say that the procedures are open to question with respect to the absolute identification of a particular defendant in a particular situation. I don't wish to make any kind of comment with respect to the particular individuals concerned. I have no knowledge in this particular case.

Q Of course not. We're talking about the procedures, and your testimony is that those leave a great deal to be

desired, is that correct?

A That is correct.

Q Now I'm going to read a statement, and I would just like to have your comment on it, and this is from Wall's Treatise on Pre-trial Identification. I believe it was quoted in the Wade case:

"As bad as a showup is, there are a number of ways it can be made worse. One method is to point out the suspect to the witness even before the showup indicating his status as a suspect. If this practice is not deemed suggestive enough, then the suspect, when shown alone, can be required to act or speak in the

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manner in which the perpetrator of the crime is supposed to have acted or spoken."

Do you agree?

A Repeat that, please.

Q "As bad as a showup is, there are a number of ways it can be made worse. One method is to point out the suspect to the witness even before the showup indicating his status as a suspect. If this practice is not deemed suggestive enough, then the suspect, when shown alone, can be required to act or speak in the manner in which the perpetrator of the crime is supposed to have acted or spoken."

A By showup, it's lineup?

THE COURT: Means one-on-one.

THE WITNESS: I entirely agree with the gist of that. I was hung up with respect to the showup, but these are features which indeed are prejudicial, I believe, to the proposed defendant.

THE COURT: We'll take a short recess at this time.

(Whereupon, a short recess was had, after which the following further proceedings were had:)

THE COURT: All right, proceed.

MR. MELTSNER: I just have a few more questions

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of Dr. Pollack, Your Honor.

THE COURT: All right, sir.

BY MR. MELTSNER:

Q I would like to clarify this matter. You have testified that a lineup is a more reliable procedure than the one-on-one procedure used in this case.

Now suppose a lineup does not contain persons who look very similar to the suspect? Do you have an opinion as to whether it is still a more reliable procedure than a one-on-one identification? Do you have an opinion?

A Yes, I do.

Q And would you state it for the Court?

A I believe a lineup can be so constituted as to be very prejudicial to a defendant. For example, if the defendant has been identified as black, and the lineup consists of one black man and ten white men, I would think it would not serve a particulary strong selective role, but to the extent to which there is opportunity in the lineup of making confusions, it protects the defendant to the extent to which the complainant can pick out someone other than the defendant. There is no opportunity to do that under the one-for-one confrontation.

Q Now one final——

A There's an opportunity to make an error is what I'm saying relative to the particular defendant, particular

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suspect in question.

Q There's an opportunity for an error in which procedure?

A There is an opportunity in the lineup procedure to

identify someone other than the suspect.

Q I see. Now again, just to clarify, and so there's no misunderstanding, you have testified as to the reliability of voice identification procedures. Assume for a moment that there were no voice identification procedures employed here, what would your opinion be as to the reliability of the identification procedure used?

A My opinion with respect to such factors as the length of time between the act and the identification, the one-on-one confrontation, the identification of the particular individual as a suspect, all of these might lead the complainant to identify a particular person under those circumstances.

MR. MELTSNER: Thank you.

CROSS-EXAMINATION

BY MR. DALE:

Q Dr. Pollack?

A Yes, sir.

Q Perhaps I misunderstood, according to the data that was given to me by Mr. Meltsner containing your accomplishments, et cetera, and qualifications, I note that you

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are, and I would certainly not question your expertise concerning acoustics or audio or something of the kind.

A That's correct.

Q But now are you an expert on eyewitness identification, or would you consider yourself to be an expert on that?

A I would not consider myself to be an expert with respect to eyewitness identification. I would, however, if I could qualify that remark, however.

Q Certainly.

A I would feel that I could comment with respect to aspects of the procedure associated with any particular identification, that is, I don't feel I'm an expert witness because I have the power to pick out from voices a particular voice. I don't pretend this particular skill. I can only comment with respect to the underlying procedures associated with any identification situation.

Q But you do know the factors that one should consider or you think one should consider when identifying a person through voice or ——

A Many of these factors I would submit are identical in the case of visual identification. I don't pretend to be an expert in visual identification, but such things as the fallibility of human memory and things of this type are not specific to voice identification.

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Q Is there not an optical memory and an audio memory?

A There indeed is. If you ask me which is more reliable ——

Q That is my next question.

A I would say that the visual memory is more reliable over a passage of time. If you ask me to make quantitative estimates, I would have to make blue sky estimates, but in any case, it's quite fallible.

Q Did you assume, in reading this transcript, that Mr. Biggers was identified by the rape victim only by voice identification?

A No, I—no. Let me answer that question.

Q To what extent, then, was there a reliance by, according to your reading of the transcript, was there a reliance by the victim on optical identification?

A I'm perhaps being asked to make a judgment that the jury was asked to make, and I feel uncomfortable in

this legalistic situation.

Q Let me read some language ——

A As I read the transcript, it seemed to me that the primary mode of identification here was auditory, and that was how I read the transcript.

If you ask me how the jury interpreted the particular set of evidence with respect to optical and auditory

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identification, I can't answer that.

Q Well, let me read from the transcript a couple of lines, and I don't know how to get you to the right page on that, but this is Officer Bailey's testimony at the trial.

"Q But that was one of the ways she identified him, wasn't it?

"A No, she identified him by looking at him, and said he was the one.

"Q Once she looked at him, that was all by which she identified him?

"A No, he said something, but I don't know exactly what he said, sir."

On the next page, same questioner, same answerer.

"Q Had she identified him before he was ever asked to talk?

"A Sir?

"Q Had she identified him before he was ever asked to talk?

"A Yes, sir."

Now this is admittedly only the testimony of one person, and it relates to the pre-trial confrontation in the police station.

A Yes, sir.

Q But now, assuming that that is the fact, that

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she did identify him by visual identification procedures as opposed to audio or voice identification, does that necessitate a reconsideration on your part?

A I don't think it necessitates a reconsideration with respect to the factors that give rise to a situation which is prejudicial with respect to the defendant. It does give rise to the problem that if visual identification is somewhat more reliable than auditory identification, then indeed this evidence should be weighted more ——

Q Then I——

A May I quote from one section which gives me the opposite impression?

Q Certainly.

A This is with respect to the direct examination of Mr. McDaniel. I'm sorry. Yes, Mr. McDaniel.

"GEN. HOLLINS: At any time, were you present when the Defendant was asked to talk?

"A Yes, sir.

"Q And what—when did that take place?

"A Right at that time when she iden——" and then he stopped—"saw him, she asked us to have him repeat a question which he repeated. That, and she also by voice, yes, sir."

The implication was that, as I read that, and I realize I'm not on this stand to be asked what my legal

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interpretation of testimony is, but as I read that, it seemed to imply that the primary mode of identification was through voice, because once you had the opportunity for identification, visually, the officer specifically demurred from taking that line of approach.

Q Now you, I am assuming, are familiar with the

process of questioning and answering in a courtroom.

A No, I am not.

Q I meant to ask you, have you testified in criminal cases?

A I have never done that, sir.

Q I see. Well now, in a case of this kind, such as the transcript we're reading from, the prosecuting attorney will ask the question, the witness will respond, and then on cross-examination, the same procedure is employed. In this particular instance, the man whose testimony you just read preceded you on to the stand. He testified that she identified him by sight, and then asked that he be required to say the words, shut up or I'll kill you.

Now he testified under oath that that was what happened. Does that necessitate a reconsideration on your part?

A It necessitates a reconsideration with respect to the extent to which the entire mode of identification was by oral means alone; yes, it does.

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Q In other words, I fully understand that you are not retracting your opinion that this situation is an unduly suggestive one?

A That is correct.

Q Is that correct?

A That is correct.

Q But is that accurate?

A That is correct.

Q But it does mean that your reliance on voice identification is perhaps, assuming this testimony to be true, is perhaps somewhat misplaced?

A I must go along with that.

Q All right, sir. Did you lean from your reading of the transcript that there was another woman victim in

the same room with Mrs. Beamer, the victim allegedly raped by Mr. Biggers, at the time this identification was made?

I'm not sure it appears in there, I'm not trying to trick you. I don't know if it's in the transcript.

A It seemed to me there was a lot of sparring among the defense and prosecution attorneys with respect to the possibility of mistrial if this matter came out before the jury, because that would prejudice the jury with respect to the particular defendant.

Q This happened to relate, if I may make this statement, this happened to relate to another person as opposed

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to the woman who was seated in the police station with Mrs. Beamer at the time, but assume, as an expert on identification of this kind, that there is another woman seated in the same room with Mrs. Beamer at the time Mr. Biggers is brought to the door, or at the time he walks to the door. Now assume that Mrs. Beamer says, that's the man, and the other woman says, that's not the man, referring to an entirely different crime.

Does this necessitate a reconsideration of your statements as to the suggestivity, if that's a word, suggestiveness, of this situation?

A If I understand your line of questioning, what you're asking is, is this additional evidence to be considered in the pool of evidence with respect to the probability that the defendant indeed—or the suspect indeed——

Q I wish you had phrased the question for me.

A But certainly it's admissible with respect to the probability of involvement, but insofar as it improves the procedure of a one-for-one confrontation, I would submit that as such it does not improve that aspect of the pro-

cedure.

Q In that—excuse me.

A If you asked me if each of two witnesses independently corroborate each other with respect to a particular crime, if it is more likely that the defendant indeed is guilty of one of the two, then I would have to say yes.

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Q But this is something that should be considered in the totality of circumstances with regard to this particular identification procedure, could you say that?

A I really must confess ignorance, Your Honor, because it seemed to me that the Court went to very great pains to separate these two cases as far as it's being prejudicial.

Q I tried to explain it to you, Doctor—excuse me one moment—the woman whose situation appeared in this transcript was not the woman seated in the police station with Mrs. Beamer. This is a hypothetical, to the extent that you are not familiar with it in the transcript.

I want you to bear that in mind. The lady that you read about, the other lady in this transcript, is not the lady seated in the police station. So you may dismiss that from your mind. This lady is another victim, seated with Mrs. Beamer, attempting to identify Mr. Biggers when he walks in the door. She says, that's not the man; Mrs. Beamer says, that is the man.

My question to you, hypothetical to the extent that you are not familiar with it, is does this indicate to you that the total picture was so suggestive as to lead these witnesses, these people who are attempting to identify this suspect, to say definitely that this is the man?

A If your question to me is that, is the total situation so suggestive that the particular complainant would

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automatically identify the individual as the particular guilty party, so suggestive that she would automatically identify the particular individual as the guilty party, then I would have to admit that here is an example of a situation where another complainant in the same situation does not automatically identify him, so if the essence of your question is the overbearing suggestiveness of the situation so great as to automatically identify the individual, then indeed you have a form of—I think very weak—but a form of proof that it is not absolutely conclusive.

Q Now you mentioned something about ninety-nine times out of a hundred, or one time out of a hundred. Would you go through that for me one more time? Do you recall your testimony on direct examination?

A Yes, I probably goofed that up, but basically what I'm trying to say is that if I take a subject in a laboratory, and I set up a reward schedule so that I give them a dollar every time—when a signal appears, he says, yes, I heard a signal, but when a signal is not presented, and he says, yes, I hear a signal, I don't penalize him, then he will be saying most of the time, yes, I hear a signal, and he will continue to respond in this particular way.

On the other hand, if I balance this in the opposite way that I very heavily penalize him for saying, yes, when there is no signal, but I don't reward him very much when

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he says, no, there was not a signal, I would get him to be responding in the other direction, and I could manipulate him all over the place.

This has nothing to do with the emotional suggestivity. It is the situation which permits me to get this kind of control over the subjects yes/no behavior.

Q I was certain in my own mind you were referring

to voice identification at the time.

A Yes.

Q That particular analogy is related only to voice identification?

A No, it is related to a very, very wide class of psychological experiences.

Q What is the reward system as it relates to voice and eyewitness identification?

A To the extent to which one—to the extent to which a given situation is far more accurate than another, then it is less amenable to this kind of manipulation, but if the situation is such as to provide uncertainty with respect to the basis of identification, then it doesn't matter whether it's voice, feel, sight, or any way you want to do an experiment.

I'm referring to sort of the decision structure of the person who has to make the judgment, and that's why the forced choice situation, where in effect the burden of proof

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on him is to pick the one that is closest to the truth and then you can check his veracity permits the experimenter to make a check on the subject.

Q You have not, as I understand your testimony, examined Mrs. Beamer, the victim of the rape?

A No.

Q Nor of Mr. Biggers, the alleged perpetrator?

A No, I don't have any opinion with respect to the individual veracity of the individuals concerned.

Q Is it possible that Mrs. Beamer's audio memory or visual memory, if you will, exceeds that of the average?

A It is entirely possible.

Q I see.

A There's people that can remember visual events for

very long periods of time. They happen to be very rare.

Q Would it have a bearing on your testimony here today if you knew that Mrs. Beamer had viewed a number of people by themselves in a showup situation, if you remember how Mr. Meltsner explained it to you?

A Yes.

Q And did not identify any of them, and by a number, I would give you an exact number if I knew.

A I recognized this from the transcript, that is if I understood the transcript, Mrs. Beamer did not identify the first picture that was presented to her.

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Q Or individual, not just picture.

A Or individual, I'm sorry. I couldn't tell from the transcript whether she had confronted any other individual other than photographs, but maybe it is in the transcript. I was unable to determine that, and I then have to go back to my statement with respect to a lineup. A lineup is better than a one for one confrontation, but if the individuals in the lineup are so dissimilar to what the general picture of the defendant is, I'm sorry, particular suspect is, then it would have very little to do, and so I can't comment with respect to how important it was that indeed Mrs. Beamer did confront other particular suspects if they indeed were very far from her, if you will, idealized picture of what the particular guilty party was like.

Q In a behavioral psychological sense, would that not indicate to you that here was a conscientious person attempting at least to designate the true perpetrator of this crime?

A I assume Mrs. Beamer is very sincere. I assume from the entire transcript there is no particular reason to single out a particular suspect in this particular case, and

she is doing, with respect to the best of her abilities, attempting to identify the perpetrator of her crime.

These are factors which I believe should be considered with respect to the extent to which the situation has

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a degree of suggestivity, suggestiveness, that is if it were completely, overbearingly suggestive, that the individual must necessarily be the one selected, then all of this evidence that you bring up with respect to the fact that the particular suspect is not the first one she confronted, and she had gone through a number of photographs previous to this situation, say that indeed Mrs. Beamer is not acting rashly and groping at straws with respect to the first witness that she is confronted with, suspect she's confronted with, sorry.

Q Would it not also have affected your determination to know that she had not identified any person prior to this and then retracted the same? In other words ——

A I think these are statements which have to be weighed with respect to the probability of accuracy of her identification, yes, sir.

Q Would it not also affect your determination that she had not failed to identify this petitioner on the first time she saw him?

A I'm sorry, perhaps there's an extra negative.

Q Did not fail to identify him the first time she saw him.

A She did not fail —that means she did identify him on the first time she saw him?

Q Does that affect your determination?

A I will have to continue to say yes, these are

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factors that would relate to the probability of her identification of a given individual.

Q Would not also the fact that there was no material discrepancies between the description that she gave the officers who answered the complaint and the actual description of this petitioner likewise have a bearing?

A I'm sure it must have a bearing. May I say I could not read from the transcript to what extent the initial description did indeed meld with——

Q I think you're right; I don't believe it's in there.

A I beg your pardon?

Q I don't believe it's in there.

A I don't believe it's in there to what extent she made an identification which later did jive with the characteristics of the individual so concerned.

Q Would not the fact that she had an opportunity to observe the individual who committed this crime also weigh in your calculation?

A If you're asking me if there was more light, would she have a better chance of identifying him, or if he talked more, she would have a chance of identifying his voice, or a hypothetical question of this type, I must assuredly say yes, the more the evidence, the greater the opportunity to make the identification.

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Q Have you studied the effect of trauma on visual and audio memory?

A No, I have not.

Q So you're not prepared to say today that the undergoing of an experience of that kind could not cement in her memory her audio and visual memory the characteristics of the particular person who perpetrated the crime?

A I am not prepared to state an expert opinion, but I do have an opinion with respect to that particular aspect.

Q As long as we have qualified that it's not an expert opinion.

A That's correct, but I believe it's somewhat more educated than a completely lay opinion in that it results from thinking about the experimental literature, I believe the literature is very contradictory on this point. That is to say, I think there are certain traumatic events which indeed result in very long lasting memories. There are others which, as a result of the traumatic event, memories are almost completely wiped out, and therefore very unreliable, and it's very hard. You can't get it by counting case histories. It's very hard to balance whether it's more likely—traumatic to burn the particular event in the person's mind or on the opposite hand more likely that the traumatic event would result in a situation such as the person would actively forget it.

Q You've not stated an opinion; you've stated

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what the split of authority is in your field.

A That's correct.

Q If I were to walk over and hit you in the jaw and say, you don't answer that question right, would you remember me seven months from now?

A I'm really not sure. I would like to answer obviously yes, but I'm really not sure. In the same way, if I were a defendant and someone pointed me out as having seen me, I would feel uncomfortable.

Q But we would take that as that is your opinion as contrasted with the mass ——

A The mass is not one way or the other. There are cases on either side where you burn in the traumatic experience and actively repress it, and it's a very difficult question to answer.

Q Just one more question. I believe I understood your testimony on direct that visual identification is more

reliable than voice identification.

A If you ask me to cite a particular experiment there, I probably could not. It is my impression that that is the case, and I just make that impression based upon sort of the totality of things available from just listening, from the case where under ideal circumstances, under ideal lighting and so forth, which I don't believe took place in this particular situation, is the case, but I will go along with that statement.

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Q Are you an expert on the identification —the identification ability of other senses such as feeling?

A No, I am not, but I believe I could comment with respect to the procedures under which identification test is made, and I feel the same way with respect to visual and voice identification. I don't feel I'm an expert witness with any powers for voice, visual or any other form of identification, but as an experimental psychologist, I can testify as to the effect of the different factors of the situation relating to the accuracy of the particular identification.

Q All right. Now given in this situation that the light perhaps could have been better, that the voice identification possibly could have been a great deal more accurate had there been opportunity for further study of the voice, in your mind, is the combination of the two identification procedures, voice and visual, made under such suggestive circumstances that it would be impossible for Mrs. Beamer to have accurately identified this petitioner?

A I think I failed right at the end. If you're asking me was the situation such that it would have been impossible for her to make an accurate identification, I must say that the evidence from the transcript does not permit

me to make that statement. It doesn't permit me to make the statement whether she could have made an accurate identification —if there was sufficient information to make an absolutely

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accurate or an absolutely inaccurate identification.

All I can say is the procedures under which she made the identification, I felt, were prejudicial with respect to the defendant.

Q Now perhaps you misunderstood me——

A I'm not trying to impeach her testimony.

Q I understand.

A I don't know the circumstances, and I don't pretend to know the specific events at the time except as revealed through the reading of the transcript.

Q I get then from the reading of your testimony, you're not saying that it would be impossible for this identification made by Mrs. Beamer to be accurate?

A It would not be impossible. If you are asking me is there a possibility that the particular defendant indeed is the guilty party, based upon the identification, of course it's possible. I'm in no way testifying——

Q You can't state to what extent it is not possible, can you?

A No, all I can say to what extent the particular procedures under which she identified him were prejudicial to the defendant, but I cannot say that there's a given probability based on the transcript that he indeed was the individual or not. I'm not making any judgment with respect to that.

Q So the variables then are really what Mrs.

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Beamer actually remembers, aren't they, and her ability—

A The variables are the environmental situations under which she made the identification, the time lapse and things of this type. Yes, sir, these are the variables, as well as the integrity, the goodness of the original information on which she was making that judgment, and I gather from the transcript that there was very little light available for her to make a visual identification.

Q Now I only have one or two more questions, but suppose you have a man of Mr. Biggers' physical characteristics at age sixteen, which is some four years ago. He was approximately this same size, if not bigger, let us assume, weighing two hundred five, two ten, possibly more, I'm not exactly sure myself, and about the same height that he is now. He is arrested and charged with a crime, and at his age, he must be treated as a juvenile, he must be taken to Juvenile Court.

Assume further there are no juveniles presently detained in Juvenile Court or Juvenile Detention headquarters that even approach his physical characteristics, which is not hard to imagine. Some of them may be colored, they may have the same type of hair, but they will be substantially smaller, they will have a youthful face.

A All right.

Q Let's assume further that at the Nashville jail we have a hundred inmates. These are adults. They may

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be over eighteen, there may be some that have the same characteristics, but they don't have a juvenile face.

If you were to arrange a lineup at that point, having people with his physical characteristics but with an adult

face, having juveniles who are smaller than he is but having a juvenile face, and having Mr. Biggers as one of those particular people, would that be a fair lineup?

A I've thought about that. It's clear that every time a particular suspect is questioned, if one has to, in effect, go out and find two brothers to make it a fair test, wouldn't that make the entire system very cumbersome?

I can't comment on the cumbersomeness of what this would require in law enforcement. In the ideal case, I would assume, extreme adherence to fairness in this case would slow down a—the particular enforcement process.

If you are asking me where I would draw a particular line with respect to when it's fair and when it isn't, I would say it must be very arbitrary, and I would certainly not feel I'm in the particular position alone of making that kind of judgment. I'm sure the law would have to consider this very carefully.

If you ask me what is the probability of getting five other black sixteen year olds weighing two hundred pounds, having youthful voices without much facial hair and all of the other characteristics that were mentioned, so that you could

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have what might be considered a truly fair test, that that probability might be very, very small.

If you ask me where must the line be drawn, I think all I can say right now is it must be drawn in such a way as you do the best you can under the circumstances, and maybe the police did the best they could under the circumstances, but I'm not in any position to judge that.

MR. DALE: All right, thank you very much, Doctor.

THE COURT: Is that all of this witness?

MR. MELTSNER: May I ask just one more question with respect to that hypothetical?

REDIRECT EXAMINATION

BY MR. MELTSNER:

Q Let us suppose that the police do set up a lineup procedure in which a number of different persons share some of the attributes originally reported by the victim to belong to the criminal. Is that, as a procedure, more likely to be reliable than the sort of one-on-one procedure?

A To the extent to which the other individuals in the lineup do share these characteristics, I believe it's more and more fair, to the extent to which you can achieve some kind of ideal match among all of them at the same time.

Q That would be better?

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A That would be better, but perhaps this is an ideal situation which is impossible to meet.

Q And a final question. Mr. Dale mentioned a number of assumptions about the record. I just want to get it clear. Have any of those assumptions changed your basic conclusion as stated on your direct examination as to the reliability of these procedures employed in this case?

A With respect to the reliability of the procedures, no.

MR. MELTSNER: Nothing further.

THE COURT: All right, Mr. Witness, that appears to be all.

WITNESS EXCUSED

MR. MELTSNER: I have no further need for Dr. Pollack's testimony. If Mr. Dale does not, would it be all right if he were permitted to remain in the courtroom?

THE COURT: So far as I'm concerned.

MR. DALE: Perfectly all right.

THE WITNESS: Thank you, sir.

MR. MELTSNER: I have just one more witness, and it will be very short, Your Honor. I would like to call Mrs. Hammonds.

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FLORA MARIE HAMMONDS,

a witness called to testify by and in behalf of the petitioner, after having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELTSNER:

Q Mrs. Hammonds, are you related to the petitioner in this case, Archie Nathaniel Biggers?

A That's my son.

Q Was your son living at home with you in Nashville on the night of August 16, 1965?

A Yes, sir, he was.

Q And did he come home that evening?

A Yes.

Q Would you describe what happened when he came home?

A He came in and told me that he had fell getting over a fence, and that he had hurt his arm, and I told him he would have to go to the hospital, and I carried him to Meharry Hospital to see about it.

Q What part of the hospital did you go to?

A The emergency.

Q And what happened there?

A Oh, we was there, and they was treating the place on his arm, and then the police came in.

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Q Now when the police came, was he receiving treatment?

A Yes, he was.

Q And how many police officers came?

A Oh, let me see, I don't remember, it was a good many of them. Oh, I'd say three or four, and there was a detective there also.

Q And what happened at that time?

A They said that they wanted to take him—wanted him to take them and show them where he had fell, and he carried them down there, because we followed him.

Q Where was it that he fell?

A On 18th and Scovel, right there at the end of the street going in home.

Q Is that near where you live?

A That's close.

Q And let me get this straight, what was your son doing when the police officers arrived at the hospital?

A When they arrived at the hospital?

Q When you first saw the police officers, what was your son doing?

A He was getting treatment for his arm.

Q Now after the police took him to this place on Scovel Street, what happened?

A They never did bring him home, they told us they

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were going to bring him home, but they never did.

Q And when was the next time you saw him?

A About three or four o'clock the next morning we went up to the jail to try to find out where he was.

Q Now did you retain an attorney?

A Yes, I did.

Q What was the name of the attorney you retained?

A Z. Alexander Looby.

Q And do you recall about the time that you retained him?

A It was the next morning which would have been the 17th, and it was close to eight, around eight—it was somewhere around eight o'clock the next morning.

Q Now were you ever asked by the police at any time whether your son could appear in a lineup?

A No, I wasn't.

Q Were you ever shown a warrant?

A No, I wasn't.

MR. MELTSNER: Your witness.

CROSS-EXAMINATION

BY MR. DALE:

Q Mrs. Hammonds, what happened to him on the night of August 16th? I didn't catch what you said.

A He was coming home, and he said he fell coming

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over a fence and cut his arm.

Q Did he elaborate on that to any extent?

A No, he just said the dogs got after him, and he fell coming over a fence.

MR. DALE: I have no further questions.

THE COURT: All right.

WITNESS EXCUSED

MR. MELTSNER: That is our case, Your Honor.

THE COURT: All right, call your first witness.

MR. DALE: Mrs. Margaret Beamer.

MARGARET FRANCES BEAMER,

a witness called to testify by and in behalf of the respondent, after having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DALE:

Q Mrs. Beamer, would you state to the Court, please, ma'am, your address and occupation?

A 2319 Meharry Boulevard, and I'm a licensed practical nurse.

Q A licensed——

A Practical nurse.

Q Were you the prosecuting witness in the case of the State of Tennessee v. Archie Nathaniel Biggers?

[89]

A Yes.

Q During the course of that trial, were you asked to identify the defendant?

A Yes.

Q Did you at the trial identify the defendant?

A Yes.

Q Is this he seated at the counsel table?

A Yes.

Q Were you able at the trial to positively identify him?

A Yes.

Q Was there a doubt in your—was there or was there not a doubt in your mind?

A No.

Q At the time of trial?

A No, there was no doubt.

Q Could you speak up just a little bit?

A No, there was no doubt.

Q Do you recall, or do you not, the afternoon of August the 17th, 1965? Perhaps I should preface that by saying were you at the police station on the afternoon of August 17, 1965?

A Yes.

Q Did you at that time identify Mr. Biggers?

A Yes.

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Q Now this was prior to the trial, was it not?

A Yes.

Q Would you describe to the Court from your best recollection what happened on that afternoon from the time you walked up on the floor and then just tell the Court what happened from that point on?

A I was escorted to a room and Mr. Biggers was walking by. Anyway, I was told they had some suspects, and if I recognized this suspect, just to look at him and see if I could recognize him, and they had him to walk past, and I was inside the room, and I could view him through the door, and I identified him.

Q Did you identify—did you or did you not identify him at that point?

A Yes, I did.

Q At what point? At what point during this procedure did he say anything, or if he said anything?

A No, I asked the officers to ask him to say something, and he repeated the words that he was asked.

Q Do you recall whether this was before or after you had identified him as the man who attacked you?

A That was after I identified him.

Q I want your best recollection on this, Mrs. Beamer,

did you identify him before he spoke the words or did you identify him after he spoke the words?

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A I identified him before he spoke the words.

Q Do you recall why you asked the police officer to have him say something?

A Well, at the time I was attacked, he was talking, and he told me the same words that I had him to say, and during the time I was attacked, he talked.

Q Did police officers bring suspects out to your house after the attack and before this identification?

A Yes.

Q Do you recall how many?

A I know there was several; I'm not sure of the number, but——

Q More than two?

A More than two or three.

Q Did you go to the police station in addition and view other suspects?

A Yes, I did.

Q Did you ever identify any other suspect?

A No, I didn't.

Q Did you look at pictures in addition?

A Yes, I looked at pictures.

Q Photographs?

A Yes.

Q Was this the first time after the attack, was this the first time you had seen Mr. Biggers?

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A Yes.

Q Do you recall how you described Mr. Biggers to the police officers who answered your call in which you informed them of the attack?

A As well as I can recall, I described him as being a teenager, and I'm not sure, but I think I gave the age between sixteen and eighteen, and I gave his weight, I'm not sure, but I think around a hundred and eighty and two hundred pounds, dark brown.

Q The complexion dark brown?

A Dark brown complexion, and I said he had kind of bushy hair, his hair was kind of—you know, not an Afro they're wearing now, but kind of bushy, and height I gave around five ten and six inches—six feet rather, I'm sorry, five ten and about six feet tall.

Q Do you recall whether you said anything or not pertaining to the type of skin that he had?

A On the face had a smooth kind of complexion, not like a man that shaved a lot, and the voice was the voice of a young teenage boy before they get—you know, reach adulthood where the voice get very deep.

Q The attack that we're talking about took place of course in your home. Would you describe, as best you recall, the lighting in the area of your home where he first attacked you?

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A Where he was first attacked, the light was—there was no light in the kitchen. I was grabbed in the hallway and pulled into the kitchen. He was in the kitchen, and I was coming out of one room, and was in the hallway, coming out of a lighted room, and he was in a dark room with no light.

Q Were there lights on in other rooms?

A Lights on in the other rooms, but not in the kitchen which the hall was dimly lit from the lights from the other three rooms.

Q Did you see his face?

A Yes.

Q Mrs. Beamer, had you not seen Mr. Biggers in the police station on the afternoon of August 17, 1965, could you have identified him in the courtroom during the trial?

MR. MELTSNER: Your Honor, that I will just have to object.

THE COURT: That probably is a little too speculative.

MR. DALE: If Your Honor please, if we can't answer that question, then I'm not sure if there is any way we can meet one of the tests.

THE COURT: What was the question? If she had not seen him at pre-trial ——

MR. DALE: Could she have identified him independently of the pretrial confrontation is essentially

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what it amounts to, and how I can ask that is another question.

THE COURT: What test are you talking about?

MR. DALE: I was looking for it.

MR. MELTSNER: If I may say, Your Honor, my understanding of that is as a legal test depending on certain objective circumstances, but not a witness' statement four years after the event she could have done something. It seems to me ——

MR. DALE: May it please the Court —excuse me, go ahead.

MR. MELTSNER: It seems to me to be too speculative to merit consideration on the point.

MR. DALE: I will attempt some objective questions if you will bear with me just a moment.

THE COURT: You may reach it in some more objective manner, concerning the pre-trial identification.

BY MR. DALE:

Q Mrs. Beamer, I'm reading from the transcript of the testimony at the state trial, and in response to a question by General Hollins, the prosecuting attorney:

"Q Are you telling this jury today that you have any doubt about this? Or do you have any doubt about this?

"A No, I don't have any doubt."

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Would you tell the Court, please, ma'am, what you meant by that, if you can recall?

A That I have no doubt, I mean that I am sure that when I—see, when I first laid eyes on him, I knew that it was the individual, because his face—well, there was just something that I don't think I could ever forget. I believe——

Q You say when you first laid eyes on him, which time are you referring to?

A When I identified him—when I seen him in the courthouse when I was took up to view the suspect.

Q All right. Now let me ask you this question. The Court in this case asked you this question:

"THE COURT: All right. Is there any doubt in your mind?

"A No, there's no doubt."

Now what did you mean when you said, "No, there's no doubt."?

A No doubt in my mind would mean that if I had any—was unsure, that this was not the individual, there would be some doubts, whether I would know whether this was the one or not the one. I had no doubts, because I was sure that this is the one.

Q Were you or not identifying him in the courtroom

as the man who attacked you?

A Yes.

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Q Was there any doubt at the time you testified that he was the man who attacked you?

A No.

Q On what basis can you tell the Court that you have no doubt that this is the man who attacked you, by what reason?

A He had the same face, this is the same man that attacked me, because he looks the same, the same face, the same build, the same color, the same hair, and the same age when I viewed him.

MR. DALE: If Your Honor please, I don't see how we can escape the necessity of some suggestive testimony on the point that I mentioned.

THE COURT: Well, she's already testified that she had no doubt. What more can you add to that? And she said what she based her testimony on.

MR. DALE: All right, sir.

THE COURT: Any identification testimony is based upon some subjective element, the appearance and observation.

MR. DALE: That's all. All right.

THE COURT: All right, any cross-examination?

MR. MELTSNER: Yes, sir.

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CROSS-EXAMINATION

BY MR. MELTSNER:

Q Mrs. Beamer, you had never seen Mr. Biggers before the alleged attack, had you? He was a stranger to you?

A That's correct.

Q And you had never seen him until August 17th, after the attack?

A That's correct.

Q And you mentioned when questioned by Mr. Dale that you identified him before he spoke?

A Yes.

Q Well, am I correct that you asked the police officers to have him speak?

A Yes.

Q And then what did he say?

A Words to this effect, shut up or I'll kill you.

Q And his voice sounded like the voice of the rapist?

A That is correct.

Q And so you were more certain in your identification, because you heard his voice?

A (Witness nods head).

Q May I have an answer?

A Yes.

Q And did you ask the police officers to have him

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speak as soon as you identifed him after seeing him?

A That is correct.

Q Now you said that the officers mentioned that they had a suspect that they wanted you to see. What did you understand them to mean by the word "suspect"?

A Suspect, in this instance?

Q Yes.

A Someone to come—someone for me to try to see if this was the individual.

Q Did you think they had any evidence against him?

A I don't know.

Q You don't know?

A No.

Q Now I understand your testimony to be that during this seven-month period, you saw a number of persons, some were brought to your house, other suspects, is that correct?

A That's correct.

Q Will you describe how that would work, a police officer would bring a man to your house, is that it?

A They brought men to the house, they brought pictures, at times I went down to the police station—or either to my house, they brought individuals by my house.

Q Now, did they bring them one at a time?

A One at a time, yes.

Q And they would bring them to your house and ask

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you whether this was the man?

A Yes.

Q One at a time?

A Yes, that's the way.

Q When you went to the police station, would you go to the homicide division and sit in a room as you did on August 17th?

A I'm trying to think how——

Q You have difficulty recalling that?

A Because at different times it occurred in different manners.

Q Well, did they just—but basically was there a procedure to bring somebody and ask you whether this was the man?

A No, at times they would have lineups.

Q What kind of lineups would they have?

A Oh, I'll say about four or five men, all dressed alike.

Q And this was —this occurred at the police station?

A That's correct.

Q But when they would bring people to your house, they would bring a man by your house and ask you whether this was the one?

A Correct.

[100]

Q Now, do you remember everything just as clearly now as you did four years ago?

A No, I don't remember everything as clearly.

Q And so you might have meant things differently when you testified in 1965 than you recall them now. That is possible, isn't it?

A I don't know.

Q You don't know whether it is possible.

Now at trial, as best you can recall in 1965, did you get down off of the witness stand and point this man out as the assailant?

A No, I didn't get down off of the witness stand.

Q Did you stand up and point a finger at him?

A Not point a finger.

Q As best as you recall, did you ever say, oh, that's him, the third person on the right, or something like that? Did you ever identify him in that manner?

A I was asked to identify him. I can't recall whether I pointed my finger, but I was asked if that was the man, and if that is him over there, and there was some way that I indicated that Mr. Biggers was the individual.

Q And he was the man who you saw on August the 17th?

A That's correct.

MR. MELTSNER: I have no further questions.

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THE COURT: All right.

MR. DALE: I have no further questions.

THE COURT: All right, that's all, you may step down.

WITNESS EXCUSED

MR. DALE: Officer Bailey.

FLOYD BAILEY,

a witness called to testify by and in behalf of the respondent, after having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DALE:

Q Mr. Bailey, would you tell the Court, please, your occupation?

A Member of the Metropolitan Police Department; work in the CID division.

Q CID is what?

A Detective division.

Q Detective division?

A Yes, sir.

Q Were you in that same division in the summer of 1965?

A I was.

Q Did you work on the case of State of Tennessee

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v. Archie Nathaniel Biggers?

A I did.

Q At that time, I don't believe it was named such a case, but you were involved in the investigation of a crime

at that time he was alleged to have committed, is that correct?

A I was.

Q Mr. Bailey, you testified at his trial, I believe, did you not?

A I did.

Q Do you remember the circumstances around the afternoon—or do you remember the circumstances of the afternoon in which Mrs. Beamer identified him as the man who attacked her?

A I do.

Q Would you describe those circumstances to the Court, please?

A Mrs. Beamer was picked up by me and my partner and brought to headquarters, placed in a room, and Biggers was brought down the hall, the full length of the hall, and carried back.

Q By brought, what do you mean?

A My partner and I escorted him down the hall.

Q Was he handcuffed or——

A No, he wasn't.

Q Did you have hold of his arm or anything?

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A No.

Q Were you in the room in which Mrs. Beamer sat at the time she identified him?

A I was at the door of the room she was in.

Q Did you hear anything that went on, or did you hear the conversation that went on in that room?

A Yes, I did.

Q Was there another lady in that room?

A It was, but I don't remember who she was.

Q Do you recall whether or not she was the victim of

another attack in that—in Nashville?

A I don't remember.

Q You don't remember?

A No.

Q Now, do you remember the circumstances around Mrs. Beamer's identification of Mr. Biggers?

A I do.

Q Would you tell the Court what happened then?

A When she saw him, she said that was the man that attacked her, and then she asked someone to have him repeat some words.

Q Did he then repeat them?

A He did.

Q Is there a—can you say without question that she identified him before he was required to speak the words?

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A She did.

MR. DALE: That's all.

CROSS-EXAMINATION

BY MR. MELTSNER:

Q Detective, just for the record, would you state your age?

A Pardon?

Q Your age?

A Forty-eight.

Q And your height?

A Five ten and a half.

MR. MELTSNER: Thank you.

MR. DALE: That's all.

WITNESS EXCUSED

MR. DALE: That's all of the evidence for the State, if Your Honor please.

THE COURT: All right. Now do you want to argue orally, or do you want to submit it on briefs?

MR. MELTSNER: We've submitted what we think is a fairly complete brief, but we would like the opportunity to file a supplementary memorandum.

THE COURT: All right, how long do you want for that purpose?

MR. MELTSNER: Ten days.

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THE COURT: Will that be sufficient for you?

MR. DALE: Yes, sir.

THE COURT: All right, ten days then for filing supplemental briefs.

MR. MELTSNER: I don't wish to take up any more of the Court's time than is necessary, but I would like to make a few general observations.

THE COURT: All right, go right ahead.

(Whereupon, oral argument was made by counsel for the respective parties.)

THE COURT: All right. Well, I will take this case under advisement, and when I receive the briefs, of course I will go over it carefully and see if there is any basis for relief, and you want ten days, both parties, you think that will be sufficient, and if you need to reply, then five days after that, either party may reply to the other brief.

MR. DALE: All right, sir.

MR. MELTSNER: Your Honor, one more thing, with respect to Mr. Williams' request, he asked about the petitioner remaining in Nashville, and I asked Mr. Dale, and he said he had no objection to it.

THE COURT: Let the order provide for that. Where is he in confinement?

MR. MELTSNER: Presently at the state penitentiary.

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THE COURT: Where was he prior to that?

MR. DALE: Brushy Mountain.

THE COURT: I see no reason why he shouldn't stay here pending the disposition of the case.

MR. MELTSNER: Thank you, Your Honor.

THE COURT: All right, adjourn Court.

(Whereupon, Court was adjourned.)

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REPORTER'S CERTIFICATE

I, Georgella Mankin, Official Court Reporter for the United States District Court, Middle District of Tennessee, with offices in Nashville, hereby certify that I recorded in machine shorthand all of the proceedings had in the case of Archie Nathaniel Biggers v. Lake F. Russell, Warden, Tennessee State Penitentiary, Civil Action No. 5120, on the 4th day of November, 1969; that these proceedings were reduced to typewriting by me; and that the foregoing is a true and accurate transcript of the said proceedings.

This the 24th day of May, 1970.

/s/ Georgella Mankin
Georgella Mankin
Official Court Reporter

[fol. 1] PLAINTIFF'S EXHIBIT NO. 2
FILED: November 4, 1969
CASE NO. 5120
BRANDON LEWIS, CLERK
BY /s/ Guy W. Cooper

CURRICULUM VITA
IRWIN POLLACK

September, 1968

NAME: Irwin Pollack SEX: Male
DATE OF BIRTH: April 10, 1925 PLACE OF BIRTH: Bridgeport, Connecticut

MARITAL STATUS: Married

WIFE'S MAIDEN NAME: Marcille Kaufman

CHILDREN'S NAMES: Sharron, Phyllis, Stanley

EDUCATION:
University of Florida, B. S., 1942-1945
Harvard University, M. S., 1945-1946
Harvard University, Ph.D., 1948-1949

POST GRADUATE TRAINING:
National Sciences Foundation Senior Postdoctoral Research Fellow, Applied Psychology Research Institute, Cambridge, England, 1960-1961.

APPOINTMENTS:
Research Assistant, Psychoacoustic Laboratory, Harvard University, 1946-1948.
Research Psychologist, U. S. Navy Electronics Laboratory, 1949.
Research Psychologist, Supervisory Research Psychologist, Director, Senior Research Psychologist Air Force Operational Applications Laboratory (GS-11 to PL-313 to GS-15), 1949-1963.

Research Psychologist, Mental Health Research Institute, Professor of Psychology, Department of Psychology, University of Michigan, 1963-present.

TEACHING APPOINTMENTS:

Teaching Assistant, Harvard University, 1947-1948.
Lecturer, University of Maryland extension program, 1956.
Summer Session Lecturer, Massachusetts Institute of Technology and University of Michigan, 1962.
Professor of Psychology, University of Michigan, 1963-present.

CONSULTING POSITIONS:

Consultant to Society of Automotive Engineers, R-6 Committee on Aircraft Noise, 1967-present.

COMMITTEE ACTIVITIES:

United States of America Standards Institute
Chairman, Writing Group S3-W-33, Evaluation of Loudness of Noise
Member of Writing Group S2-W-49, Speech Intelligibility
Member of Writing Group S3-W-53, Talker Identification

National Academy of Sciences—National Research Council
Committee on Hearing and Bio-Acoustics (CHABA), Charter Member
Committee on Bio-Astronautics, Air Force Designated Member

Advisory Committee to Director, Psychobiology, National Sciences Foundation, 1965-1968.

MEMBERSHIP IN PROFESSIONAL SOCIETIES:

Member, U. S. Delegation to International Standardization Organization and International Electroacoustical Committee, Helsinki, 1961.

American Psychological Association
Acoustical Society of America
Psychonomic Society

EDITORIAL ACTIVIEIES:

Associate Editor, Perception and Psychophysics, 1967 to present.

Associate Editor, Organizational Behavior and Human Performance, 1967 to present.

HONORS:

Fellow, Acoustical Society of America, 1952.

Fellow, American Psychological Association, 1954.

U. S. Government Award, Sustained Superior Performance, 1955.

Supreme Court of the United States

No. 71-586 ----, October Term, 19

William S. Neil, Warden,

Petitioner

v.

Archie Nathaniel Biggers

ORDER ALLOWING CERTIORARI. Filed February 28 ---------- , 1972

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth ---------- Circuit is granted.

Mr. Justice Marshall took no part in the consideration or decision of this petition.